TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted] 142

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, *ET AL.*, APPELLANTS,

vs.

THE WASHINGTON WATER POWER COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED OCTOBER 30, 1922.

(29,223)

(29,223)

SUPREME COURT OF THE UNITED STATES.

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No. 673.

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, *ET AL.*, APPELLANTS,

vs.

THE WASHINGTON WATER POWER COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 24, 1923.

1-9 IN THE

District Court of the United States for the District of Idaho, Northern Division.

Consolidated Causes Nos. 752, 753, 754, and 755.

THE WASHINGTON WATER POWER COMPANY, a Corporation, Plaintiff,
vs.
JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, ANTHONY KERR, Defendants.

Complaint Against John Swendig.

[Filed May 18, 1920.]

The Washington Water Power Company, a corporation organized under the laws of the State of Washington, as plaintiff brings this bill of complaint against John Swendig, and for cause of action alleges:

I.

The plaintiff is now and was at all of the times mentioned in the complaint, a corporation created and existing under and by virtue of the laws of the State of Washington, having its principal
10 place of business at Spokane, Washington, and now is, and was at all of the times mentioned in this complaint, a citizen of the State of Washington, and has at all of the times hereinafter mentioned fully complied with the laws of the State of Idaho relating to foreign corporations, and is now, and was at all of the times herein mentioned, authorized and empowered by virtue of such compliance with the laws of the State of Idaho to do business and to acquire and hold property in said State, and that under and by virtue of its articles of incorporation it is and at all of the times herein mentioned has been empowered to construct, acquire, own and operate electric power transmission lines and telephone lines in the State of Idaho.

That the defendant is a resident and citizen of the State of Idaho.

II.

That the jurisdiction of the United States District Court for the District of Idaho over this suit is invoked and depends upon the following grounds, to-wit:

(1) Upon the ground that the construction and application of the Act of February 15th, 1901, Chapter 372 (31 Statutes at Large, 790) entitled "An Act Relating to rights of way through certain parks, reservations, and other public lands"; and also the Act of March 3, 1901, (31 Statutes at Large, 1083) is involved; and also

the Act of June 21, 1906 (34 Statutes at Large, 335) is in-
11 volved; and that the amount in controversy exceeds in value
the sum of $3,000, exclusive of interest and costs, all of which will appear from the facts hereinafter set forth. That the suit involves a claim to real property in the District of Idaho.

(2) On the ground that the plaintiff is a citizen and resident of the State of Washington and that the defendant is a citizen and resident of the State of Idaho, as appears by the first paragraph of this bill of complaint, and that the suit involves a claim of title to real property in the Northern Division of the District of Idaho, and the amount in controversy in this suit exceeds in value, exclusive of interest and costs, the sum of $3,000.

III.

That the land described as Section 26, Township 47, N. R. 3, W. B. M., was formerly a part of the Cœur d'Alene Indian Reservation.

That prior to April 15, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for authority to construct a telephone line through and across the Cœur d'Alene Indian Reservation in the State of Idaho, which said right of way so applied for crossed, among other lands within said reservation, the land described as the Northeast quarter of Section 26, Township 47, N. R. 3 W. B. M., the said application being made in pursuance of Section 3 of the Act of Congress approved March 3,
1901, entitled "An Act making appropriation for the current
12 and contingent expenses of the Indian Department and for
fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes."

That at that time the said lands were a part of the Cœur d'Alene Indian Reservation and were unsurveyed and not open to settlement.

The right, authority and permission to survey and locate and maintain a telephone line through and across the said Cœur d'Alene Indian Reservation and across the said Northeast quarter of Section 26, Township 47 N. R. 3, W. B. M., was on the 15th day of April, 1902, granted by the Honorable Secretary of the Interior upon condition that the company pay such damages and compensation by reason of the location and construction of said line as were thereafter assessed under the direction of said Secretary of the Interior, which said compensation was thereafter assessed and fixed by the said Secretary of the Interior at the sum of $224, which said sum was by this plaintiff paid into the office of Indian Affairs under the said act of Congress above referred to.

That the said right of way and easement granted by the said Secretary of the Interior, as aforesaid, was over and across, together with other lands, the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

13 That the said grant and easement above mentioned has ever since been and now is a valid and subsisting grant and easement and in full force and effect.

IV.

That prior to July 7, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for a permit for a right of way across, and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation. That said application was made in pursuance of the provisions of the Act of February 15, 1901, (31 Statutes at Large, 790). That the right, authority and permission applied for was given by the Honorable Secretary of the Interior under date of July 7, 1902, and the use of the right of way was permitted in accordance with the provisions of said act of Congress and the regulations thereunder.

That at that time the said lands over which the said right of way was sought were a part of the Coeur d'Alene Indian Reservation and were unsurveyed and not open to settlement.

That the said permit so given to this plaintiff by the Secretary of the Interior on the said 7th day of July, 1902, was over and across, together with other lands, the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

14 That the said permit above mentioned has ever since been and now is a valid and subsisting permit in full force and effect, and was issued long prior to any rights initiated by the defendant and long prior to the time when said lands were open to occupancy and settlement.

V.

That pursuant to the said permit, the plaintiff did construct over and across the said Coeur d'Alene Indian Reservation a high tension electric power transmission line extending from Spokane, Washington, to Burke, Idaho, and ever since on or about the 24th day of August, 1903, has been using the same for the purpose of supplying electric power and energy in the mining district of Shoshone County, Idaho, and that the said electric power transmission line is of great value, to-wit, of more than the value of $25,000, and that the right to maintain the same and to exercise the rights of the plaintiff under the said permit is of the value of more than $25,000, exclusive of interest and costs, and the value of the use of said line and of said right of way is of the value of more than $25,000, exclusive of interest and costs.

VI.

That the said plaintiff, under its easement and right to construct a telephone line, did also construct over and across said right of way and upon the same poles as the electric power transmission line was constructed, a telephone line and has continued to operate

15 and maintain the same and use the same ever since on or about the 24th day of August, 1903. That the said telephone line is of great value, to-wit, of the value of more than the sum of $5,000, and the right to maintain the same and to exercise the rights

of the plaintiff under the said permit is of the value of more than $5,000, exclusive of interest and costs, and the value of the use of said line and of said right of way is of the value of more than $5,000, exclusive of interest and costs.

VII.

That *is it* necessary for the plaintiff to patrol the said line and every part thereof, including that portion of the line which extends across the said Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M., and in order to do so the plaintiff, did, under its permit and as a necessary part of the construction and maintenance of said line, construct along the said power transmission line a patrol road, which said patrol road this plaintiff constructed during the years 1902 and 1903, and ever since has used the same, except as the use thereof has been interferred with by the acts of the defendant, as hereinafter set forth.

That the said patrol road is necessary in order for the patrolmen to pass along the said power transmission line for the purpose of watching the same, keeping the same in working condition and in the event of accident or injury thereto for the purpose of re-
16 pairing or renewing the same, and is covered by the said easement and also by the said permit.

VIII.

That the said power transmission line, telephone line and patrol road have not been changed whereby they would differently affect the said Northeast quarter of Section 26, Township 47 N. R. 3, W. B. M., since the year 1903.

IX.

That by virtue of said facts, this plaintiff became vested by virtue of its said permit with the right to maintain and operate its said electric power transmission line as provided in the said permit, and that by virtue of such facts, the defendant, took whatever right, title or interest was vested in him by the Government of the United States by virtue of said permit to said land subject to the permit granted by the government of the United States to this plaintiff and the permit to use the said lands in connection with its said power transmission line and the rights of the defendant are subsequent to and subject to the rights of this plaintiff under and by virtue of said permit above described, which has never been revoked and remains in full force and effect.

That also by virtue of said facts, this plaintiff became vested by virtue of its said easement to use said land in connection with its telephone line, as provided in said easement, and that by
17 virtue of such fact the defendant took whatever right, title or interest was vested in him by the Government of the United

States by virtue of said patent to said land, subsequent and subject to the easement granted by the Government of the United States to this plaintiff and the easement to use said land in connection with its said telephone line, and the rights of the defendant are subsequent to and subject to the right of this plaintiff under and by virtue of said easement above described, which has never been revoked and which remains in full force and effect.

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line, of said telephone line and of said patrol road along the same, the defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 2nd day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast
18 quarter of Section 26, Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about the 3rd day of May, 1913, and thereafter patent of the United States was issued therefor on or about the 30th day of October, 1913, and the defendant holds under said title.

XI.

That at the time said lands were settled upon by the defendants as also at the time the said lands were selected and filed upon by the said defendant, and at all times since, the said permit and said easement of this plaintiff, and each thereof were in full force and effect, and said power line, telephone line and patrol road had been constructed over and across said lands, and at all of said times were used by the said plaintiff and any rights acquired by the said defendant were subsequent to and inferior to the plaintiff's easement, and subject to and inferior to plaintiff's said permit.

That at and before the defendant settled upon or filed upon said lands or initiated any rights thereto, the said power transmission line, telephone line and patrol road were constructed over and across said lands and the plaintiff was maintaining and operating its said lines and the said defendant at the time of acquiring any right had full notice and knowledge of said plaintiff's said easement and that the plaintiff was operating the said telephone line thereunder, and also had full notice and knowledge of the plaintiff's said per-
19 mit and that the plaintiff was maintaining and operating its said electric power transmission line, and for the purpose of

caring for the same and patrolling the same, renewing and repairing the same, had constructed and was using the said patrol road, and that the said telephone line, electric power transmission line and patrol road crossed, among other lands, the said lands described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.

That the said defendant acquired any rights by virtue of his settlement and filing upon said lands with full knowledge of all such facts and the patent issued by the Government of the United States therefor was subject to the rights of this plaintiff both under said permit and said easement.

XII.

That the said permit so granted unto this plaintiff for the maintenance of said electric power transmission line as also the easement and rights to this plaintiff for a right of way for said telephone line granted under the said two acts of congress, heretofore referred to, were prior to any right acquired by the defendant, and the settlement and initiation of the rights of the defendant on said lands was subsequent to the plaintiff acquiring the said rights by virtue of the said permit and by virtue of said easement, and the subsequent patent of said lands to the said defendant by the United States Government under and by virtue of the Act of June 21, 1906, did
20 not affect, revoke or annul either the said permit or the said easement, and the plaintiff has at all times since the granting thereof had the right to operate and maintain the same, and has had the right to patrol the same and to maintain for that purpose the said patrol road along the same. That the said patrol road is a necessary incident to the maintenance of said power transmission line.

XIII.

That the said defendant, since acquiring his interest in said lands, has extended a fence across said rights of way on the east of the section line of said Section 26, and another fence approximately along the north and south quarter line of said Section 26, Township 47 N., R. 3 W. B. M., and has so constructed the said fences and wired the same up as to prevent this plaintiff and its employes from driving along the same or passing along the same with any vehicle or horse, and has closed up said patrol road and declines and refuses to permit this plaintiff to patrol the same and has notified the employes of this plaintiff that they should not go upon the said land to repair the said lines or the poles or to otherwise maintain the same, and gives out and threatens that he will prevent the plaintiff or its employes from going along the same or repairing the said transmission line and telephone, all of which is in violation of the rights of this plaintiff granted as aforesaid; and has ordered this
21 plaintiff and its employes in the future not to go upon said lands for the purpose of repairing said lines.

XIV.

That the said homestead entry and settlement of the defendant and the said patent of the United States issued pursuant thereto were all subject to the rights of this plaintiff and the issuance of said patent by the Government of the United States did not modify, annul, revoke or cancel either the said permit or the said easement.

That the said defendant has prevented the employes of this plaintiff from driving along said right of way and patrolling the same in a proper manner, and threatens to continue said conduct in the future, and has warned the employes of this plaintiff not to go upon said land to repair the said power transmission line and telephone line or either thereof, or the poles upon which the same are strung, and threatens to continue such conduct in the future, all of which will seriously impede and interfere with the performance of its duties as a public service corporation by the plaintiff and prevent it from enjoying its rights under the said permit and under said easement.

That this plaintiff is engaged in furnishing power for the use of the mines of the Coeur d'Alene mining district and for the use of the inhabitants of that district for light and power, and furnishing light for municipal use, and the acts of the defend-
22 ant do interfere with and will interfere with the discharge of those duties.

Wherefore, plaintiff prays:

(1) That this court may issue its injunction perpetually enjoining and restraining the said defendant and all persons acting under his authority or pretending so to act, and all successors in interest of said defendant, from interfering with this plaintiff in operating and maintaining the said electric power transmission line and the said telephone line and the said patrol road over and across the Northeast quarter of Section 26, Township 47 N., R. 3, W. B. M., and from passing along and over the said patrol road;

(2) That the said defendant, his agents, servants and employes, be restrained during the pendency of this action from interfering with this plaintiff in operating and maintaining the said electric power transmission line and the said telephone line and the said patrol road over and across the Northeast quarter of Section 26, Township 47 N., R. 3, W. B. M., and from passing along and over said patrol road;

(3) That this court shall decree that the said permit and the said easement and each thereof are in full force and effect and that the said patent of the United States did not annul, revoke or modify or affect the rights of this plaintiff thereunder.

23 (4) Plaintiff also prays for its costs and for general equitable relief. John P. Gray, W. F. McNaughton, Attorneys for Plaintiff. Residence and P. O. Address, Coeur d'Alene, Idaho.

STATE OF IDAHO,
County of Spokane, ss:

V. G. Shinkle, being first duly sworn, on his oath deposes and says:

That he is the Treasurer of The Washington Water Power Company, the plaintiff in the above entitled action and makes this verification for and on behalf of said plaintiff, and is duly authorized so to do; that he has read the foregoing complaint, knows the contents thereof and that he believes the facts therein stated to be true. V. G. Shinkle.

Subscribed and sworn to before me this 14th day of May, 1920. S. C. Scott, Notary Public for Washington, residing at Spokane, Washington. (Notary Seal.)

[File endorsement omitted.]

24 In United States District Court.

(Title of Court and Cause.)

Complaint Against James W. Miller.

[Filed May 18, 1922.]

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric transmission line, of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335) provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 4th day of May, 1910, the defendant made a homestead filing upon the land described as the North half of the Southwest quarter and the East half of the Northwest quarter of Section 26, Township 47 N., R. 3, W. B. M., and thereafter made final proof on or about the 3rd of June, 1913, and thereafter patent of the United States was issued therefor on or about the 23rd day of January, 1913, and defendant holds under said title.

[File endorsement omitted.]

25 In United States District Court.

(Title of Court and Cause.)

Complaint Against Remigus Grab.

[Filed May 18, 1922.]

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line, of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation, and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 7th day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast quarter of Section 24, Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about June 24, 1912, and thereafter patent of the United States was issued therefor on or about the 24th day of September, 1912, and the defendants holds under said title.

[File endorsement omitted.]

26 In United States District Court.

(Title of Court and Cause.)

Complaint Against Tony Kerr.

[Filed May 18, 1920.]

X.

That at the time of the issuance of said permit to this plaintiff and also at the time of the issuance of said easement to this plaintiff and at the time of the construction of said electric power transmission line of said telephone line and of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

That by the act of June 21, 1906 (34 Statutes at Large, 335), provision was made for the allotment to the members of the Coeur d'Alene tribe of Indians of lands within the Indian reservation,

and the subsequent opening of the said reservation to settlement by citizens of the United States.

That on or about the 22nd day of December, 1910, the defendant made a homestead filing upon the land described as Lot 2, and the Southeast quarter of the Northwest quarter and the Southwest quarter of the Northeast quarter and the Northwest quarter of the Southeast quarter of Section 19, Township 47 N., R. 2 W. B. M., and thereafter made final proof September 28, 1917, and thereafter patent of the United States was issued therefor on or about
27 the 15th day of October, 1918, and the defendants hold under said title.

[File endorsement omitted.]

In United States District Court.

(Title of Court and Cause.)

Answer of John Swendig.

[Filed Oct. 7, 1920.]

Comes now the defendant and for answer to plaintiff's alleged cause of action, admits, denies and alleges as follows:

I.

Admits all of paragraph I of plaintiff's complaint.

II.

Answering paragraph III of plaintiff's complaint, defendant admits that the land described as Section 26, Township 47, N. R. 3 W. B. M., was formerly a part of the Coeur d'Alene Indian Reservation.

As to whether or not, "Prior to April 15, 1902, plaintiff filed an application with the Department of the Interior of the United States of America for authority to construct a telephone line through and across the Coeur d'Alene Indian Reservation in the State of Idaho, which right of way so applied for crossed, among other lands within said reservation the land described as the Northeast quarter of Section 26, Township 47, N. R. 3. W. B. M., the said application being made in pursuance of Section 3 of the Act of
28 Congress approved March 3, 1901, entitled, 'An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June 30, 1902, and for other purposes,'" defendant has no information or knowledge sufficient to enable him to answer, therefore he denies each and every allegation thereof, and each and every allegation in said paragraph contained, and denies that prior to April 15, 1902, or prior to any

other date, or on any other date, plaintiff filed an application with the Department of the Interior of the United States, or with any other department of the United States, for authority to construct a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation in the State of Idaho, and denies that said right of way so applied for, if applied for, crossed among other land within said reservation, the land described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and denies that said application, or any other application, "was made in pursuance of Section 3 of the Act of Congress approved March 3, 1901, entitled, 'An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June 30, 1902, and for other purposes,' "or that said application or any other application for said permit, or any application
29 for any permit to construct a telephone line across the Coeur d'Alene Indian Reservation, which permit was also over and across said land, was ever filed, by or in behalf of plaintiff, with the Department of the Interior of the United States, or with any other department of the United States, pursuant to said above-mentioned act, or pursuant to any other act or acts of Congress whatsoever.

Denies that the right, authority and permission, or the right, authority, or permission, or any other right, authority or permission, to survey, locate and maintain, or to survey, locate or maintain a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation, or across said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; was, on the 15th day of April, 1902, or on any other day, or date, granted to plaintiff or any person in its behalf by the Honorable Secretary of the Interior, or by any other person having lawful authority to grant such right, authority or permission, upon condition that plaintiff pay such damages and compensation by reason of the location and construction of said line as were thereafter assessed under the direction of said Secretary of the Interior, or upon any other condition or conditions, or at all; denies that said compensation, or any other compensation, was thereafter assessed and fixed, or assessed or fixed, by said Secretary of Interior, or by any other person having lawful authority to so
30 assess or fix such compensation, at the sum of Two Hundred Twenty-four ($224.00) Dollars, or was assessed and fixed, or assessed or fixed, by said Secretary of the Interior, or any other person having lawful authority to so assess or fix such compensation, at any other sum or sums whatever, or at all; and denies that plaintiff, or any person in its behalf, paid into the office of Indian Affairs, or into any other office of the United States, under said Act of Congress, above referred to, or under any other act or acts of Congress, or at all, the sum of Two Hundred Twenty-four ($224.00) Dollars, or any other sum or sums whatever for any permit, right or authority, to survey, locate and maintain, or to survey, or locate, or maintain, a telephone line through and across, or through or across the Coeur d'Alene Indian Reservation, which permit, right or authority crossed the above-described land.

Denies that the said right of way and easement, or said right of way or easement, or any other right of way or easement, granted by the Secretary of Interior, or by any other person having lawful authority to grant such rights of way or easements, was over and across, or over or across, together with other lands the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and further denies that any right of way or easement, whatsoever, has ever been granted by the Secretary of Interior, or any other
31 person having lawful authority to grant the same, to plaintiff, or any person in its behalf, or to any other person, to go upon said land or any part thereof for the purpose of constructing, locating, or maintaining any telephone line or lines whatsoever.

Denies that said grant and easement, or said grant or easement above-mentioned, or any other grant and easement, or any other grant or easement has ever since been and now is, or has ever been, or not is, a valid and subsisting grant and easement in full force and effect, or a valid or subsisting grant and easement in full force and effect, or a valid and subsisting grant or easement in full force and effect, or a valid or subsisting grant or easement in full force and effect, or a valid or subsisting grant or easement in force or effect.

III.

Answering paragraph IV of plaintiff's complaint, defendant says that as to whether or not, "Prior to July 7, 1902, this plaintiff filed an application with the Department of the Interior of the United States of America for a permit for a right of way across, and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation. That said application was made in pursuance of the provisions of the Act of February 15, 1901, (31 Statutes at Large, 790)" defendant has no sufficient information or knowledge to enable him to answer, therefore and upon that ground, denies each and every allegation
32 thereof and each and every allegation in said paragraph contained, and denies that prior to July 7, 1902, or prior to any other date, or on any other date or day, plaintiff, or any person in its behalf, filed an application with the Department of the Interior of the United States, for a permit for a right of way across, and permission to construct and maintain, or for a permit for a right of way across or permission to construct or maintain, or for a permit for a right of way across or permission to construct or maintain an electric power transmission line over and across, or over or across, the Coeur d'Alene Indian Reservation, which right of way was also over the above-described land; and denies that said application, or any other application for said purposes, was made in pursuance of the provisions of the Act of February 15, 1901 (Statutes at Large, 790), or that any application, whatsoever, was made, by plaintiff, or any person in its behalf, in pursuance of any other Act of Congress, for a permit for a right of way, or permission to construct and maintain, or permission to construct or maintain, an electric power transmission line over and across, or over or across, the Coeur d'Alene In-

dian Reservation, which right of way was also over the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; and denies that the right, authority and permission, or right, authority or permission, applied for, if applied for, or any other right,
33 authority and permission, or any other right, authority or permission, was given by the Honorable Secretary of the Interior, or by any other person having lawful authority to grant such right, authority, and permission, or such right, authority or permission, under date of July 7, 1902, or under any other date, or at all, and further denies that the use of the right of way, or the use of any other right of way, whatsoever, was permitted in accordance with the provisions of said Act of Congress and the regulations thereunder, or in accordance with the said Act of Congress or the regulations thereunder, or was permitted in accordance with any other provisions of said Act of Congress, or any provisions of any other Act of Congress, or was permitted at all.

Admits that the above-described land, of this defendant, was a part of the Coeur d'Alene Indian Reservation, and in the year of 1902, was unsurveyed and was not open to settlement, but denies that any right of way was ever sought by plaintiff, or any person in its behalf, or by any other person, over and across, or over or across, said land for any purpose, or purposes whatsoever.

Denies that said permit, or any other permit, so given, or in any other manner given to this plaintiff, or any person in its behalf, or any other person whatsoever, by the Secretary of Interior, or any other person having lawful authority to give such permits, on the 7th day of July, 1902, or on any other date, was over and across, or over or across, the said Northeast quarter of Section 26,
34 Township 47 N., R. 3 W. B. M.

And denies that the said permit above-mentioned, or any other permit, whatsoever, for said purposes, or for any other purposes, has ever since been and now is, or has ever been, or now is, in full force and effect, or in full force or effect; and further denies that said permit, or any other permit, whatsoever, was issued to plaintiff, or any other person, prior to the time when said lands were open to occupancy and settlement, or prior to the time when said lands were open to occupancy or settlement, or prior to any rights initiated by the defendant, or subsequent to said times, or at all.

IV.

Denies that pursuant to the said permit, or that pursuant to any other permit, the plaintiff did construct over and across, or over or across the Coeur d'Alene Indian Reservation a high tension electric power transmission line, and further denies that plaintiff ever had any permit, whatsoever, to construct over and across, or over or across, said reservation, or said land, a high tension electric power transmission line, or any other line.

Admits that plaintiff did construct, and is now maintaining a high tension electric power transmission line across the land that was formerly the Coeur d'Alene Indian Reservation, and particularly

across the above-described land of this defendant but denies that it ever had, or now has, any permit to so construct and maintain, or construct or maintain, said line across the land aforesaid; and admits that the right to maintain the same is of the value of more than Twenty-five Thousand ($25,000.00) Dollars, but denies that plaintiff has ever had or now has any right to so maintain said line; and denies that plaintiff has any right under said permit, if such permit ever existed, or under any other permit relating to the land that was formerly part of said reservation and now belongs to this defendant; and further denies that the right to exercise the rights of plaintiff under said permit, is of the value of Twenty-five Thousand ($25,000.00) Dollars, or any part thereof, or that the right of plaintiff, as relating to said land, is of the value of any other sum or sums, whatever.

V.

Denies that said plaintiff, under its said easement and right to construct a telephone line, or under its said easement or right to construct a telephone line, or under any other right and easement, or right or easement, to construct a telephone line across said lands, did also construct over and across, or over or across said right of way and upon the same poles, or over or across said right of way, or on the same poles, as the electric power transmission line was constructed, a telephone line. Admits that plaintiff did construct a telephone line over and across the said lands and upon the same poles, as the electric power transmission line, and admits that plaintiff has been using the same for some time past, but denies that plaintiff ever had any authority, or permit, or right, whatsoever, to so construct said telephone line or any other line across the said lands. Admits that the right to maintain said telephone line is of great value, but denies that plaintiff has any right whatsoever to so maintain the same, or ever had any right to construct the same, upon said land.

VI.

Denies that it is necessary for the plaintiff to patrol the said lines and every part thereof, or said line or any part thereof; and denies that it is necessary for the plaintiff to patrol that portion of the said line which extends across the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M.; denies that, in order to patrol said line, the plaintiff did, under its permit and as a necessary part of the construction and maintaining of said line, or under its permit or as a necessary part of the construction and maintaining of said line, or under its permit or as a necessary part of the construction or maintaining of said line, or at all, construct along the said power transmission line a patrol road, which said patrol road was constructed during the years of 1902 and 1903, or during the year of 1902 or 1903, or during any other year or years, or at all; denies that plaintiff has used said patrol road, or any part thereof, or any other patrol

road, since said time, or any part thereof; or at all; and
37 further denies that plaintiff ever had, or now has, any permit, or right whatsoever, to construct said power transmission line, telephone line, or patrol road, or that plaintiff ever had, or now has, any right whatsoever, to maintain the same upon said land of this defendant, and denies that said patrol road is a necessary part of the constructing and maintaining, or the constructing or maintaining said power line and telephone line or either of them.

Denies that said patrol road, or any part thereof, or any other patrol road, is covered by said easement and also by the said permit, or is covered by said easement or by the said permit, or by any other easement and permit, or by any other easement or permit, whatsoever; and further denies that plaintiff now has or has ever had any easement or permit of any kind or nature in any manner connected with the aforementioned land of this defendant.

VII.

Denies that by virtue of said facts, or by virtue of any facts, this plaintiff became vested by virtue of its said permit, or by virtue of any other permit, with the right to maintain and operate, or the right to maintain or operate its said electric power transmission line, or any other line, as provided in the said permit, if said permit ever existed, or any other permit, or at all; and denies that by virtue of
38 such facts, or by virtue of any other facts, the defendant took whatever right, title or interest that was vested in him by the government of the United States subject to the permit granted by the Government of the United States to plaintiff, or subject to any other permit granted by the United States to this plaintiff, or to any other person or persons, or subject to any permit, whatever, granted by any other person or persons having lawful authority to grant such permits; and denies that the title or interest of this defendant, in said land is subject to the permit, or any other permit, to use the said lands in connection with plaintiff's power transmission line; and further denies that the rights of defendant are subsequent to and subject to, or are subsequent to or subject to, the rights of this plaintiff under and by virtue, or under or by virtue, of said permit above described, or any other permit; and further denies that plaintiff now has, or ever had, any permit, right or rights, whatsoever, to use the above-described land in any manner; and denies that plaintiff's permit, if plaintiff ever had a permit, has never been revoked; and further denies that said permit is in full force and effect, or is in full force or effect, or is in force and effect, or has ever been in force or effect, upon the land of this defendant.

Denies that by virtue of said facts, or by virtue of any other facts, this plaintiff became vested by virtue of its said easement, or by virtue of any easement, to use said land in connection with its
39 telephone line, as provided in said easement, or any other easement, or at all; and denies that by virtue of such facts, or by virtue of any facts, the defendant took whatever right, title or interest that was vested in him by the Government of the United

States by virtue of said patent, subsequent to and subject to, or subsequent or subject to, the easement granted by the Government of the United States, or subject to any other easement granted to this plaintiff by any person, whatsoever, having lawful authority to grant such easements; and further denies that the easement, or any other easement, to use said land in connection with said said telephone line has ever been granted to this plaintiff or any person in its behalf, or at all, by any person, persons, or state having the lawful authority to grant such easements across the land in question; and denies that the rights of the defendant are subsequent to and subject to, or are subsequent or subject to, the right of this plaintiff under and by virtue, or under or by virtue of said easement, or any other easement, or are subject to the rights of this plaintiff in any other manner, and further denies that plaintiff has any rights, whatsoever, in any wise connected with the said land of this defendant; and denies that said easement has never been revoked, and denies that it remains in full force and effect, or in full force or effect, or in force or effect; and further denies that any such easement, has ever been, or
40 now is, in force or effect.

VIII.

Denies that at the time of the issuance of said permit, if said permit was ever issued, to this plaintiff, or any person in its behalf, or at the time of the issuance of said easement, if said easement was ever issued, to this plaintiff, or at the time of the construction of said electric power transmission line, or at the time of the construction of said telephone line, or at the time of the construction of said patrol road along the same, the said defendant had no right, title or interest in or to said land or any part thereof.

Admits that on or about the 2nd day of May, 1910, the defendant made a homestead filing upon the land described as the Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., and thereafter made final proof on or about May 3, 1913, and thereafter patent of the United States was issued to defendant therefor on or about the 30th day of October, 1913, and that defendant holds under said title.

IX.

Denies that at the time said lands were settled upon by the defendant as also at the time the said lands were selected and filed upon by him, and at all times since, or at any of said times, the said permit and easement, or said permit or easement of this plaintiff, or any of them were in full force and effect, or were in full force
41 or effect, or were in force or effect, and denies that at said times, or at any of said times, said power line, telephone line and patrol road, or any of them, had been constructed over and across, or over or across, said lands, and denies that at any of said times, said telephone line or said power line, or said patrol road were used by the said plaintiff, and further denies that any rights acquired by the said defendant were subsequent to and inferior to, or were

subsequent to or inferior to plaintiff's easement, or were subject to and inferior to, or subject to or inferior to plaintiff's said permit, or that defendant's right- were in any manner, whatever, subject to any rights of plaintiff, or are now subject to any such rights; and further denies that plaintiff ever had, or now has, any right or rights, whatever in, over or to the land now belonging to this defendant.

Denies that at and before, or at or before, the defendant settled upon or filed upon said lands or initiated any rights thereto the said power transmission line, telephone line or patrol road were constructed over and across, or over or across, said lands; and denies that the plaintiff was mainta-ning or operating, or was maintaining and operating its said lines at the times aforesaid, or any of them; and denies that the said defendant at the time of acquiring any right had full notice and knowledge, or notice or knowledge, of
42 plaintiff's said easement; and denies that the plaintiff was operating the said telephone line thereunder at the times aforesaid, or that plaintiff had any such easement at said times, or at any other times or time; and denies that defendant had full notice and knowledge, or notice or knowledge of the plaintiff's said permit, or any other permit, and further denies that plaintiff ever had, or now has, a permit to go upon said land for the purposes of said telephone line, electric power transmission line, or patrol road, or for purposes in anywise connected with the same or for any other purpose, or at all; and denies that for the purpose of caring for the said lines and for patrolling the same, renewing and repairing the same, or for any of said purposes, or for any other purposes, plaintiff had constructed and was using the said patrol road, or had constructed or was using the same; and denies that at the times aforesaid, or any of them, the said telephone line, electric power transmission line or patrol road crossed, the said lands described as the Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

Denies that the said defendant acquired any rights by virtue of his settlement and filing or by virtue of his settlement or filing upon said lands with full knowledge or any knowledge of all or any such facts; and further denies that they are facts; and denies that the patent issued by the Government of the United States, there-
43 fore was subject to the rights of this plaintiff either under said permit, or any permit, or at all, or under said easement, or any easement, or at all; and further denies that plaintiff now has, or has ever had, any rights whatsoever, in any manner connected with the said land of defendant for any purpose or purposes, or at all.

X.

Denies that said permit so granted, or any permit granted to this plaintiff, or any person in its behalf, or to any other person whatsoever, for the maintenance of said electric power transmission line or the easement and rights, or easement or rights, of this plaintiff, for a right of way for said telephone line, or any other telephone line, granted under said two acts of Congress, or granted under any other

act or acts of Congress, were acquired prior to any right acquired by defendant; and denies that the settlement and initiation, or the settlement or initiation, of the rights of the defendants on said lands was subsequent to the plaintiff acquiring the said rights by virtue of the said permit and by virtue of said easement, or either of them; and further denies that said patent was subsequent to plaintiff acquiring said rights by virtue of said permit or by virtue of said easement, or that said patent was subsequent to or subject to any right, easement, or permit given to this plaintiff, or otherwise acquired by it in any manner whatsoever; and further denies that plain-
44 tiff ever had, or now has any such right, or any other right, or rights in anywise connected with said land; and denies that said patent did not effect, revoke and annul, or did not effect, or revoke, or annul, either the said permit or the said easement, if either ever existed; and denies that the plaintiff has at all times since the granting thereof, or at any of said times, had the right to operate and maintain or the right to operate or maintain the same, or ever had, or now has, any such right; and denies that plaintiff has had or now has the right to patrol the same or to maintain for that purpose the said patrol road along the same; and further denies that said patrol road is a necessary incident to the maintenance of said power transmission line, or is a necessary incident to any other right or rights of this plaintiff; and further denies that plaintiff ever has had or now has, any such rights or any rights whatsoever, in, over, or to said land.

XI.

Denies that the extension of any fence across the right of way now occupied by plaintiff's line, or the building or extending of any fence or fences in any manner whatever on the land of this defendant above-described, has deprived or will deprive plaintiff of any rights whatsoever, now held or at any time held or owned by said plaintiff, which rights are in any manner connected with said land; and further denies that plaintiff now has, or has ever had any right in, to, or over the lands aforementioned; and denies that any act
45 or acts of defendant in any manner connected with the said Northeast quarter of Section 26, Township 47 N., R. 3 W. B. M., has, or will deprive this plaintiff of any right or rights whatsoever.

XII.

Denies that the said homestead entry and settlement, or either of them, of the defendant and the said patent of the United States issued pursuant thereto, were all, or any of them subject to the rights of plaintiff; and denies that said patent did not modify, annul, revoke and cancel the said permit and said easement and each of them.

And denies that the acts, or conduct of this defendant, in any manner connected with said land, will, or has deprived or prevented plaintiff from enjoying its rights under the said permit and under the said easement, or either of them, and denies that plaintiff now

has or has ever had any right, or rights whatsoever in any manner connected with the aforementioned land, for any purpose or purposes, or at all; and further denies that plaintiff now has, or has ever had any permit or easement to go upon or occupy said land for any purpose or purposes, whatsoever.

For a further, second, separate and affirmative defense to plaintiff's alleged cause of action, defendant alleges:

46 I.

That at all times herein mentioned, defendant has been and now is a citizen of the United States of America, over the age of 21 years; and now is and during all the times hereinafter mentioned has been, a citizen of the United States and of the State of Idaho.

II.

That prior to the 2nd day of May, 1910, the land mentioned in plaintiff's complaint, and described as the Northeast quarter of Section 26; Township 47 N.; R. 3 W. B. M., Kootenai County, Idaho, was a part of the unappropriated Public Domain of the United States; and thereafter and on or about the 2nd day of May, 1910, defendant duly, regularly and in conformity with the law made a homestead filing upon said land; and thereafter, and on or about the 3rd day of May, 1913, duly and regularly made final proof upon said land; and thereafter and on or about the 30th day of October, 1913, a patent for the land described as, the Northeast quarter of Section 26; Township 47 N.; R. 3 W. B. M., was duly and regularly issued by the United States of America to this defendant.

III.

That said patent, so issued, from the United States to this defendant, conveyed all the right, title and interest of said grantor in and to said land to this defendant, free from all permits, licenses, easements and se-vitudes of whatsoever kind or nature, except,
47 "Any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and therein reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder," and is in words and figures as follows:

Coeur d'Alene 03983. 4-1023.

The United States of America to all whom these presents shall come, Greetings:

Whereas, a Certificate of the Register of the Land Office at Coeur d'Alene, has been deposited in the General Land Office, whereby it appears that full payment has been made by the claimant, John Swendig, according to the provisions of the Act of Congress of April 24, 1820, entitled, "An Act making further provision for the sale of the Public Lands" and the acts supplemental thereto, for the North-east quarter of Section twenty-six in Township forty-seven north of range three west of the Boise Meridian, Idaho, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor-General.

Now know ye, That the United States of America, in consideration of the premises and in conformity with the several Acts of
48 Congress in such cases made and provided, has given and granted, and by these presents does give and grant, unto the said claimant and to the heirs of the said claimant the Tract above described: To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States, and all the coal or oil deposits therein or thereunder.

In testimony whereof, I, Woodrow Wilson, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the Thirtieth day of October, in the year of our Lord one thousand nine
49 hundred and thirteen and of the Independence of the United States the one hundred and thirty-eighth. By the President. Woodrow Wilson, By M. P. Le Roy.

Recorded: Patent Number 363,017. L. A. C. Lamar, Recorder of the General Land Office.

IV.

The defendant has, at all times since the issuance of said patent, held title to said lands, therein described, under said patent and has owned, possessed and occupied said premises under said patent and grant and in accordance with the title and rights thereby granted, conveyed and conferred, and now so holds the same.

Wherefore defendant prays:

That the plaintiff's action be dismissed and it take nothing thereby and that defendant be given his costs and disbursements herein. J. F. Ailshie, Ray Agee, Attorneys for Defendant, Residence and Post Office Address, Coeur d'Alene, Idaho.

STATE OF IDAHO,
County of Kootenai, ss:

John Swendig, being first dhly sworn, on his oath deposes and says:

That he is the defendant in the above-entitled action; that he
50 has read the foregoing answer, knows the contents thereof and believes the facts therein stated to be true. John Swendig.

Subscribed and sworn to before me this 23rd day of October, 1920. M. W. Frost, Notary Public, in and for the State of Idaho, Residing at Harrison, Idaho. (Seal.)

[File endorsement omitted.]

In United States District Court.

(Title of Court and Cause.)

Motion to Dismiss.

[Filed June 7, 1920.]

Now comes the defendant and moves the Court to dismiss plaintiff's pretended action herein for the reasons and upon the grounds following:

I.

That the complaint does not state facts sufficient to entitle plaintiff to any relief whatever. That it appears upon the face of the complaint that defendant holds a patent from the United States for the fee simple title and Estate in and to the whole of the lands over which plaintiff's pole, power and telephone line extends, and that at the time of the issuance of said patent the United States made no reservation of title whatever, either to itself or for the use or benefit

of plaintiff or any one else for a power line, telephone or pole
51 line of any kind. That it appears upon the face of the Complaint that plaintiff has no grant or easement of any kind from the defendant's grantor the United States, or from defendant or any one to go upon or maintain its pole, power or telephone line on or across defendant's land.

II.

That the Honorable Secretary of the Interior had no power or authority of law to give or convey title, or an easement or an irrevocable license to plaintiff for the purpose of maintaining a power, pole, telephone, transmission or other lines across said lands and that he did not and could not do so and that the United States has parted with all its right and title in and to said lands and that by said grant the Honorable Secretary of the Interior has lost all power of control or supervision over said land and any license or permit to any one to go upon or across the same has been thereby revoked and that the issuance of patent was a revocation of all previous permits and licenses given or granted.

III.

That no reservation of any title or right was made in or by said patent and that no implied reservation did arise, or was made and that none exists and that any such reservation is inconsistent with the terms of the grant contained in defendant's said patent.

Wherefore, defendant prays that plaintiff's pretended action be dismissed and its complaint be held for naught and that
52 defendant be awarded his costs herein. J. F. Ailshie, Wm. H. Bonneville, Attorneys for Defendant, P. O. Address, Cœur d'Alene, Idaho.

[File endorsement omitted.]

In United States District Court.

(Title of Court and Cause.)

Memorandum Decision upon Motion to Dismiss.

[Filed Sept. 18, 1920.]

John P. Gray and W. F. McNaughton, Attorneys for Plaintiff.
J. F. Ailshie, Attorney for Defendant.

DIETRICH, *District Judge:*

Admittedly the motion to dismiss in this case involves precisely the same question that was disposed of in Washington Water Power Company v. Harbaugh, 253 Fed. 681, but in view of the earnestness with which counsel for the defendant has represented it, I have given it additional consideration. While, as originally suggested, the question is not entirely free from doubt, I am not convinced that the conclusion reached is erroneous. It is true that the patent
53 upon its face purports to be absolute, but as pointed out in the Harbaugh case, at the time it was issued there was in force the following express general regulation: "The final disposal by the United States of any tract traversed by a right of way permitted under the said act shall not be construed to be a revocation of such

permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act." I am inclined to think that the defendant took his patent subject to the reservation thus provided for, and that in effect his status is the same as it would have been had the language of the regulation been written into the patent. There cannot, at this stage at least, be any contention that the defendant was ignorant of the plaintiff's interest, for it was in open possession of the right of way and was using the same; and it must be asumed that the defendant knew of the regulation. What view should be taken in a case where the patent issued prior to the promulgation of the regulation need not be discussed.

Accordingly, the motion will be denied, and a like order will be entered in each of the cases numbered 752, 753 and 755.

[File endorsement omitted.]

54 In United States District Court.

(Title of Court and Cause.)

Statement of Case.

[Filed July 26, 1921.]

Be it remembered that on the 23rd day of May, 1921, the case of Washington Water Power Company, a Corporation, vs. John Swendig, No. 752; the case of Washington Water Power Company, a corporation, vs. James W. Miller, No. 753; the case of Washington Water Power Company, a Corporation, vs. Remigus Grab, No. 754, and the case of Washington Water Power Company, a Corporation, vs. Anthony Kerr, No. 755, and each of them came on for trial before the Court without a jury at Cœur d'Alene, Idaho. John Gray appearing for plaintiff and J. F. Ailshie and Ray Agee appearing for each of the defendants.

It appeared that the same question was involved in each of said cases, and upon stipulation of attorneys, in open Court, the cases were consolidated by order of the Court for trial upon both law and the facts for all purposes in this and all Courts, and for all purposes as entitled above, and thereupon the following evidence was introduced, and the following proceedings had, as hereinafter set out in this statement of the case, to-wit:

FRANK LANGLEY, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Gray:

55 I am Register of the Government Land Office in this city. I have under my charge the plats of townships in this land

district. I have with me plats of townships 42-7 and 47-3 West. These plats are official records of our office. Said plats were thereupon offered in evidence by Mr. Gray as Plaintiff's Exhibits No-. 1 and 2 and leave asked to substitute certified copies.

Mr. Ailshie: I object to this as incompetent and immaterial, and not only that, but it tends to incumber the record, and it covers matters that are not in issue here. It only affects the lands of one quarter section of land involved here, and there is no issue as to the power line running across the lands that we have taken patents for.

Mr. Langley: These plats are now in the condition in which they were when they were first filed in our office in so far as showing the power line across the plats. The electric power line shown on the two plats was there when it was filed in our office. This is not the original plat that was filed. It is a certified copy. The original was destroyed by Fire in October, 1911, and the tract books in the office show the date of filing of the original plats. For township 47-2 West, the filing date is May 2, 1910. For 47-3 West, it is May 2, 1910. These plats are copies, certified to by the Recorder of the General Land Office, filed to replace the old original plats that were burned in the fire.

Offered in evidence.

Objection overruled; Plaintiff's exhibits 1 and 2 admitted.

56 Thereupon the Court granted exceptions to both parties to all adverse rulings, including the foregoing ruling.

Mr. Langley: This is the copy of a circular with respect to entries of lands in the Cœur d'Alene Indian reservation, issued by Mr. Witten, with respect to entries being subject to railroad rights of way and power transmission lines. I did not look for the original. It came with a letter from the Commissioner of the General Land Office.

Q. Are you able to tell the date that circular was originally issued?

Objected to as not the best evidence of the date when issued.
Objection overruled.

A. I am not able to tell the date. I might be able to find the date. I haven't looked for it. I have such circular with reference to the Cœur d'Alene Indian Lands in my files. The one I have found is attached as an exhibit to a letter from the Commissioner of the General Land Office, dated July 8, 1921, I do not know whether or not one of these was received at any previous time.

Q. Is the certified copy which I have here a copy of the letter which you have in your files?

Objected to as not the way to prove copies.
Sustained.

Mr. Gray: Well, I will offer that in evidence and in lieu of it I will offera certified copy.

57 Objected to as incompetent to prove any facts in issue, and on the ground that it was not issued by the Secretary of

the Interior or the Commissioner of the General Land Office, and hasn't the force or effect of an executive order or an order of the Department, and upon the further ground that this circular provides that, "All lands for which rights of way have been obtained for railroads or power transmission lines must be entered subject to such rights of way," and the permit for power transmission is only a license and not an easement.

Received subject to the objection which was to be considered later.

Cross-examination.

By Mr. Ailshie.

I have no memory of the original plat of which this is a certified copy. I couldn't identify or remember any particular line or thing that is on this copy. I cannot say of my own knowledge whether or not these lines indicating a power line were on there when the original plat was filed in our office.

Thereupon a certain plat was marked Plaintiff's Exhibit No. 4.

Mr. Gray: I desire to offer in evidence a map, the original easement and grant from the Secretary of the Interior to the Washington Water Power Company, for a telephone line across the Cœur d'Alene Indian reservation, marked for identification as Plaintiff's Exhibit No. 4.

58 Objected to as not identified or proven to be a plat or map issued, or permit granted by the Department.

Overruled; Plaintiff's Exhibit No. 4 admitted.

Thereupon certain papers were marked Plaintiff's Exhibits Nos. 5, 6, 7, 8, 9, and 10.

Mr. Gray: I desire to offer in evidence a file of correspondence marked Exhibits 5 to 9, inclusive, and Plaintiff's Exhibit No. 10, the voucher for $224.00 of the Washington Water Power Company, received by E. A. Hitchcock, Secretary of the Interior, showing the appraisal of damages for that right of way, and the payment to the Government of the United States.

Mr. Ailshie: I object to each of the offered exhibits not because it is not shown that they are what they purport to be, but because they are incompetent to prove any issue in the case and not the best evidence.

Overruled; Plaintiff's Exhibits 5 to 10 inclusive, admitted.

Thereupon a certain paper was marked Plaintiff's Exhibit No. 11.

Mr. Gray: I desire to offer the permit, a certified copy of the permit for a power transmission line over the Coeur d'Alene Indian Reservation.

The Court: I don't know that this correspondence is identified with this particular right of way, gentlemen.

59 Mr. Gray: I will do that later, if Your Honor please. This is a certified copy of the original.

EUGENE LOGAN, a witness produced and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Gray:

I am a civil engineer residing in Spokane. I was educated at Washington State College. I have been engaged in the practice about thirteen or fourteen years. At present I am engineer for the Washington Water Power Company. I have been with the company about thirteen years. I am familiar with the telephone line and the power transmission line in question here. This is the only line across the Coeur d'Alene Indian reservation. Both lines are on one line of poles. I have seen Plaintiff's Exhibit 4 and also Exhibit 11. I have surveyed that line out since. The lands were subdivided into townships and sections and other legal subdivisions. I have a map showing the line as it crosses the lands of the defendants. I have surveyed it across the lands of each defendant. It is the same line that is shown upon Exhibits 4 and 11, and in the same place. I made the survey in 1909. The Company has never had any other telephone line or power transmission line, across the Coeur d'Alene Indian Reservation and these lines have been located in the same position ever since I have been with the company. I
60 have maps showing the line as it crosses the individual lands of the defendants. These two maps show the line across the lands of the four defendants.

Plaintiff's Exhibits Nos. 12 and 13 were then offered in evidence.

Objected to on the same grounds as other objections to exhibits.

Overruled, and Plaintiff's Exhibits 12 and 13 were admitted.

Cross-examination.

By Mr. Ailshie:

I made the last survey in 1909. I was through there last fall. I haven't made any survey since that time. The telephone wires and transmission wires are on the same poles. The current carried over that line is approximately sixty thousand volts. These poles are principally thirty-five foot poles, with a seven-inch top. There is one transmission wire that is on an insulator which sets on top of the pole. It is a three-wire transmission. The other two are on a single cross arm. The telephone wire is on another cross arm either seven or nine feet below the transmission wire. I do not know which was constructed first, the transmission line or the telephone line. They were on there the first time I was there. They would not be likely to put in poles of that size if it was constructed for a tele-

phone line in the first place. Those are not standard telephone poles.

61 Redirect examination.

By Mr. Gray:

I couldn't see any difference in the position of the line last fall and when I made my survey.

JOHN B. FISKEN, a witness produced and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Gray:

I am an electrical engineer residing in Spokane. I was educated at the Government College in Glasgow, Scotland, and I have followed it since 1886—35 years I had charge of the construction of the Washington Water Power Company's lines from about 1904 until three years ago. I had charge of the maintenance and operation of all the transmission lines up to about three years ago. I have been with the Washington Water Power Company since 1887. The first power line was finished in the Coeur d'Alenes in the summer of 1903. I am familiar with the manner of construction of this line. It is necessary to watch the condition of the line, to anticipate repairs and renewals, and make repairs at the time of the patrol, if it can be done, and generally to see that the line is in shape to give service. We have to watch for the condition of the insulators, to note whether they are cracked or not, whether any of the tie wires, which tie the conductors to the insulators, are coming off or not, to note the condition of the insulators on the telephone line and also the tie wires, to see that there is no
62 liability of the telephone line or the transmission lines getting tangled up; to note the condition of the poles from the ground up, and on occasion to make tests of the poles below the ground line; to note the condition of the surroundings of the poles, from fire risk standpoint; also from the standpoint of safety in case of washouts.

Q. Mr. Fisken, does that line serve any important use? If so, what?

Objected to as immaterial and incompetent.

Overruled.

It serves the Coeur d'Alene Mining District, the mines, mills, smelters, and dredges, besides the distribution systems in Kellogg and Wardner, Osborne and Wallace. That line was always patrolled while I was in charge. It was usually patrolled by a man on horseback, and sometimes on snowshoes. This practice continued from 1903. The patrolmen were located along the line at intervals, depending upon the difficulties of getting along the patrol road. They always carried a telephone and their body tools, some small

insulators and a little wire. At times they would have more than that, but that was the regular equipment. A patrolman could make any repairs on the telephone line at any time, and he could repair poles. He could not handle the high tension transmission wires. Service had to be interrupted to do it. There was a patrol road established when the line was built. It was close to the poles wherever
63 it could be. There were a few places where it was impossibl- to put a patrol road right along the line. It is necessary to have a patrol road along a transmission line, with the right to freely go along it. It is necessary to use a road or right of way for the repair of the lines, it is necessary to enable repair materials to be hauled in. It is necessary to repair poles occasionally. The average life of a pole is about 15 years. A patrolman should pass not more than fifty to seventy-five feet from the line. The right of way should be a minimum of fifty feet on each side of the line. It is necessary in timbered country to enable men to get in there in case of fire in the adjacent timber. It is necessary for replacing either permanent or temporary guys, and for raising poles.

Cross-examination.

By Mr. Ailshie:

I don't know whether or not there has even been any road through any of the places owned by these defendants. I did not patrol the line at that point. All I know is that I have employed men up there for that purpose. I do not know where these premises are. We would need fifty feet on each side of the line through a man's field. It is necessary for guys and handling the poles. I don't know whether or not we have used it in this particular location. A great many of the poles in this location have been stubbed. Some have been replaced.

64 Leroy Hooper, a witness produced and sworn on behalf of the plaintiff, testified as follows:

Examination.

By Mr. Gray:

I am a patrol man for the Washington Water Power Company, residing at Medimont, Idaho. I patrol from Rose Lake on the East to the St. Joe River on the West. I patrol the complete line once a week when weather conditions permit. I make repairs both permanent and temporary. I haven't replaced any poles since I have been on the job, but I have stubbed some of them. I have been working there since the 19th day of September, 1920. I have stub-poles which have broken off and partially fallen over. I patrol for anything unusual along the line, either growth of trees, or broken insulators, wires, or poles leaning over. I observe the conditions of the poles as I go along. I should pass within not more

than one hundred feet from the poles. I have not been able to travel along there on my horse or wagon that close to the lines. In places there are solid fences, and no gates. I follow the road. The only way I can follow the pole line is on foot. It is necessary to go along the pole line to replace a pole, with a team, at least one horse.

Cross-examination.

By Mr. Ailshie:

I have been acquainted with the patrol line through the
65 places of the defendants since last September. I was over the line with a previous patrol man a number of times before that. I do not know whether or not there has ever been a patrol road along the line through there or not. My recollection is that in patrolling with my brother, about nine years ago, we followed the pole line with a buggy. I couldn't say who owns the land over which we crossed. We patrolled with a buggy, and followed the pole line. I was not familiar, at that time, with who owned the lands. We could go practically the whole line. The country is rolling through there. It is not passable with the buggy at the present time. I was speaking of nine years ago. The road in some places at the present time is a quarter of a mile from the pole line. We go in there on *n*foot. It has not always been the same. The first time I saw it, about nine or ten years ago, we practically followed the pole line from the top of the hill above Medimont to the brow of the hill overlooking the St. Joe River near Chatcolette, South of Harrison.

Redirect examination.

By Mr. Gray:

The road East of Mr. Swendig's place follows or crosses the power line. I follow that road past his place, the road passes to the North, and I follow the road until I come to Mr. Miller's land, when I enter his land, which I think is at the corner, and then I
66 come back to the power line and after winding back of Miller's house and barn, I get to the power line. I follow the pu' lic road. It takes me in places half a mile from the line; the timber is so thick that I can't see the line in places for four or five miles at a stretch. If I want to go over the line I have to get out and walk over to it. The ground along the pole line across Swendig's place was plowed up when I went through in April.

Recross-examination.

By Mr. Ailshie:

When I spoke of four or five miles through timber, I did not refer to Swendig's place. It was three or four miles East of his place, over toward Kellogg.

Redirect examination.

By Mr. Gray:

The power line runs diagonally across Swendig's place, and when the power line crosses the road of course I am at the line, and then I go straight ahead along the road which I think is a section line and I will be a quarter of a mile from it at the greatest distance. I don't know Kerr's land and Grab's land by the description from the map, but I know where it lies in reference to the power line. The public road is about half a mile to a mile from the power line as it crosses Kerr's place.

67 ALBERT H. BECKWITH, a witness produced and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Gray:

I am an electrical engineer, residing at Spokane, Washington. I was educated at McGill University, Montreal, and have been practicing since May, 1906. I am assistant to the Superintendent of Light and Power with the Washington Water Power Company. I am familiar with the line of the Company which extends across what was formerly the Cœur d'Alene Indian reservation, also across the lands of the defendants. I was over that line about a week ago. I have been assistant on the maintenance work since 1918. We have maintained a patrol along that line all the time. It is necessary to patrol this line because the poles are now getting to an age that they are deteriorating very rapidly, and we have to stub them. We have to observe broken insulators, broken wires, and keep our telephone line operating properly, to keep in communication with the Cœur d'Alene Mining District. A patrolman should pass immediately along the line. A patrol road is necessary to enable us to drive along the line, because we have to haul subs and wire and hardware for making necessary repairs, or if poles burn down, we have to haul poles in on the line to replace the ones burned
68 down. Sometimes the entire poles have to be taken in, in place of stubs. The right of way should be one hundred feet wide. So that in case a pole falls over it may be replaced by a new one, you would have to use that much ground, fifty feet on the side of the line, at least, to get another pole up into place again and get that one out of the way. Here and there we have to put temporary guys on, and they have to be set back from the line far enough so that they will hold the pole in position. The contour of the country is not always such that we can run right along at the foot of the poles.

E. S. CRANE, a witness produced and sworn on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Gray:

I reside at Cœur d'Alene, and am right of way agent for the Washington Water Power Company. I have been working for the company for sixteen years. The Company did not build any other telephone line or power line across the reservation other than the high power line. It was built in 1902 and 1903. I know the lands of the four defendants. There was a patrol road built all the way along that line, and it was the only road that was built into that county to that day, up to 1910. It was the only road. It crossed the lands of the defendants before they filed on them. I was over their lands last year. Some of it was plowed up.
69 The patrol road is fenced off. I went around a different road, the County road, I think it is. The power line is at the same place as it originally was. The right of way for this telephone and power line across the reservation was appraised by Major Anderson. He was Indian Agent, I think his headquarters were at Spokane, but he had charge of the Cœur d'Alene Indian Reservation.

Mr. Gray: I desire to offer a certified copy of the letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated August 23, 1912.

Objected to on the ground that it is incompetent to prove any easement or franchise or other right in the real estate in question.

Overruled; Plaintiff's Exhibit 14 admitted.

J. W. MILLER, a witness produced and sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. Ailshie:

I am one of the defendants. I made entry upon the tract of land described in the complaint served on me; also final proof. Defendants' Exhibit No. 1 is the patent that was issued to me for this land.

Defendants' Exhibit No. 1 admitted in evidence and copy thereof contained in answer substituted for original patent.

70 I have been the owner of this land ever since I received my patent for it. I am still the owner and have been in possession of it during all that time.

Cross-examination.

By Mr. Gray:

This power line across my land was there when I first settled on the land. I knew it when I made my first entry. It is in the same place as it was at that time.

JOHN SWENDIG, a witness produced and sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. Ailshie:

I reside on a farm at Harrison, and I am one of the defendants. I filed and made final proof on the land described in the complaint against me. I also received patent for it. Defendants' Exhibit No. 2 admitted in evidence and the copy thereof contained in the answer substituted for the original patent.

I have owned this land ever since I received patent for it, and am still the owner. I have been in possession of it all the time since I first entered it. There has not been exactly a road along the pole line. It was passable at all times. I don't know that I ever remember of a road being there.

71 Cross-examination.

By Mr. Gray:

When I first settled here, this pole line, power transmission line and telephone line were constructed across the land. I don't know whether or not it was there when I made my entry. I was not sure of my lines. The power line was there at that time. I don't remember whether or not the line was shown on the plat in the land office or not. I examined the plat. I don't remember about the power line. I did not consider it at that time. It was there before I settled.

REMIGUS GRAB, a witness produced and sworn on behalf of the defendants, testified as follows:

Direct examination.

By Mr. Ailshie:

I live at Harrison on a farm. I am one of the defendants. I made entry on the lands described in the complaint served on me. I made final proof on the same. Defendants' Exhibit No. 3 is the patent that was issued to me for this land.

Defendants' Exhibit No. 3 was thereupon admitted in evidence and the copy thereof included in the answer substituted for the original patent.

I have owned that land ever since I received the patent and am still the owner. I have been in possession of it all that time.

72 Cross-examination.

By Mr. Gray:

When I settled on the land the power line of the Washington Water Power Company ran across it. I didn't know it at first but I saw it was there when I filed on it. It has been there ever since.

Redirect examination.

By Mr. Ailshie:

I filed on it here at Coeur d'Alene. I asked them about the power line, and they told me I couldn't fence it up so long as the government owned it. They told me that when I had a patent for it then I could do as I pleased with it. No one would have any rights to it.

Recross-examination.

By Mr. Gray:

The people in the land office told me that. I don't know who the officer was. And I asked them about the road and about getting through the place, and they said I couldn't fence it up so long as it belonged to the Government, yet, and when I get a patent it is my own, and I am the boss myself on it. Mr. Whitney made that statement, a couple of them there made it.

Mr. Gray: I move to strike that out if Your Honor please.

Motion sustained.

73 ANTHONY KERR, a witness produced and sworn on behalf of defendants, testified as follows:

Direct examination.

By Mr. Ailshie:

I reside at Harrison, Idaho, on a farm. I am one of the defendants. I filed upon the tract of land described in the complaint which was served on me in this action, and made final proof upon it. I received a patent for the land. It is the document marked Defendants' Exhibit No. 4. I have owned that land ever since, and am still the owner of it, and have been in possession of it ever since that time.

Thereupon Defendants' Exhibit No. 4 was admitted in evidence and the copy thereof contained in the answer substituted for the original patent.

Cross-examination.

By Mr. Gray:

The power line and telephone line had been constructed across that land when I first saw it. I knew it before I filed on the land. It has been there ever since.

Mr. Ailshie: I now offer in evidence a certified copy of the order and decision of the Secretary of the Interior, of date April 23, 1921, construing and passing upon the effect of the order of August 24th that has just been introduced by plaintiff.

74 Objected to on ground that it doesn't construe the order of August 24th.

Overruled; and Defendants' Exhibit No. 5 admitted in evidence, which is a copy of the certified copy of said order and decision, dated April 23, 1921.

And be it further remembered that the foregoing comprises all the evidence that was introduced or considered upon the trial of said consolidated causes.

And now come the defendants and submit the foregoing draft of statement of case and exceptions and pray an order settling the same.

Dated this 24th day of June, 1921. J. F. Ailshie and Ray Agee, Residing at Coeur d'Alene, Idaho, Attorneys for Defendants.

Order Settling Statement of Case.

Settled, allowed and ordered filed as Statement of Case and Exceptions this 26th day of July, 1921. Frank S. Dietrich, District Judge.

Lodged June 24, 1921. W. D. McReynolds, Clerk, by L. M. Larson, Deputy.

[File endorsement omitted.]

75 In United States District Court.

(Title of Court and Cause.)

Decree.

[Filed May 26, 1921.]

The above causes came on to be heard before the Court at Coeur d'Alene, Idaho, on the 23rd day of May, 1921.

It appeared that the same question was involved in each of said

cases, and the attorneys for the parties stipulating thereto and the Court believing that it was proper that said causes be consolidated, it was ordered that the said four cases be consolidated and tried as one case.

Thereupon the Court heard the evidence adduced by the parties and the argument of counsel, and the case having been submitted for the decision of the Court, and the Court having heretofore made its decision herein, and now being well advised in the premises, upon consideration thereof,

It is ordered, adjudged and decreed as follows:

(1) That the permit granted and given by the Secretary of the Interior of the United States to the plaintiff, The Washington Water Power Company, in pursuance of the provisions of the Act of Congress of February 15, 1901 (31 Stat. at Large, 790) and dated July 7, 1902, for a right of way across and permission to construct and maintain an electric power transmission line over and across the Coeur d'Alene Indian Reservation, and over and across, together with other lands, the

76 Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2, W. B. M. is a valid and subsisting permit and in full force and effect, and the plaintiff, The Washington Water Power Company, is in possession of said right of way and of said power transmission line constructed over and along said right of way and is the owner of said permit and power line.

(2) That the plaintiff, The Washington Water Power Company, is the owner of a right of way easement for a telephone line upon and across, together with other lands, the said

Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township N. R. 2, W. B. M. which easement for right of way was acquired by the plaintiff under the provisions of Section 3 of an Act of Congress approved March 3rd, 1901, entitled "An Act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations

77 with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes," which said right of way easement was granted by the Secretary of the Interior of the United States under date of April 15, 1902, and which said right of way is identical with the said right of way for the elec-

tric power transmission line, referred to in paragraph 1 of this decree, and said telephone as now constructed is incidental to the use of the said power transmission line, and the said right of way easement so granted is now in full force and effect and is a valid and subsisting easement for right of way.

(3) That the plaintiff is entitled to maintain along said power transmission line and telephone line a roadway, which said roadway must be within fifty feet of the center of said line as the same is now constructed over and across the lands described as follows:

Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2, W. B. M. and the agents, servants and employes of the plaintiff are entitled to go along said power transmission line at all times and to keep and maintain said roadway for such purpose.

78 (4) Plaintiff is further entitled, in making repairs or renewals, to the use of such land within fifty feet of the center of said line as may be necessary for renewals.

(5) That the title of the defendant, John Swendig to the land described as the Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, James W. Miller, to the land *n*described as the North half of the Southwest quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, Remigus Grab, to the land described as the Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M., is subject to the foregoing rights of the plaintiff.

That the title of the defendant, Anthony Kerr, to the land described as Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2 W. B. M., is subject to the foregoing rights of the plaintiff.

It is further ordered, adjudged and decreed that if any one of the defendants maintains any fence or fences on, around or across said lands, he must provide gates therein for the plaintiff's use of sufficient width for the passage of ordinary vehicles at the places

79 where said roadway passes through any such fence, and the plaintiff shall furnish locks and keep said gates locked.

It is further ordered, adjudged and decreed that the said defendants and each of them, and all persons acting under the authority of any of them, or pretending so to act, and all successors in interest of said defendants and of each of them, be and they hereby are perpetually enjoined and restrained from interfering with the plaintiff in the operation and maintenance of the said electric power line and said telephone line and said patrol road over and across the said lands described as follows:

The Northeast quarter of Section 26, Township 47 N. R. 3 W. B. M.

The North half of the Southeast quarter and the Southeast quarter of the Northwest quarter of Section 26, Township 47 N. R. 3 W. B. M.

The Northeast quarter of Section 24, Township 47 N. R. 3 W. B. M.

Lot 2 and the Southeast quarter of the Northwest quarter of Section 19, Township 47 N. R. 2 W. B. M.,

and from interfering with the agents, employes and officers of said plaintiff in patrolling and inspecting the said line and going along said roadway at any and all times, and from in any manner interfering with the plaintiff in making repairs or renewals thereof or in conveying materials therefor along said road.

80 It is further ordered, adjudged and decreed that the rights of the plaintiff shall be limited to a strip of land fifty feet on each side of said electric power transmission line as the same is now located upon the ground, and that subject to the plaintiff's reasonable needs for the uses herein defined, the defendants shall have the right to occupy and utilize said strip of land, and the plaintiff and its employes in going along said road must use reasonable care to do no more injury to the defendants' growing crops than may be reasonably necessary, and must keep within fifty feet of the center line and in a roadway on one side or the other thereof, except as may be necessary in passing from the road to the poles or line. In making repairs or renewals reasonable care shall be exercised not to do unnecessary damage to crops growing along and near the line.

It is further ordered, adjudged and decreed that the plaintiff do have and recover its costs herein taxed as follows:

Against the defendant, John Swendig	$53.29
Against the defendant, Remigus Grab	$40.69
Against the defendant, Anthony Kerr	$40.69
Against the defendant, James W. Miller	$40.69

Dated this 26th day of May, 1921. F. S. Dietrich, Judge.

[File endorsement omitted.]

80½ United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

81 At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Tuesday, the fourteenth day of February, in the year of our Lord one thousand nine hundred and twenty-two.

Present: Honorable Erskine M. Ross, Circuit Judge, Presiding; Honorable William W. Morrow, Circuit Judge; Honorable William H. Hunt, Circuit Judge.

No. 3769.

[Title omitted.]

Order of Submission.

Ordered appeal in the above entitled cause argued by Mr. James F. Ailshie, counsel for the appellants, and by Mr. John P. Gray, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel for the appellee to file a reply brief within twenty (20) days from date, counsel for appellant to file an additional memorandum.

82 At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the third day of July, in the year of our Lord one thousand nine hundred and twenty-two.

Present: Honorable William W. Morrow, Circuit Judge, presiding; Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

Order Filing Opinion, etc.

By direction of the Honorable Erskine M. Ross, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a Decree or Judgment be filed and recorded in the Minutes of this Court in each of the said causes in accordance with the opinion filed therein:

83 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

[Title omitted.]

Upon Appeal from the United States District Court of the District of Idaho, Northern Division.

Before Ross, Morrow, and Hunt, Circuit Judges.

Opinion, Ross, J.

[Filed July 3, 1922.]

The appellant, a corporation engaged in the generation and distribution of electricity in the states of Idaho and Washington, filed, prior to July 7, 1902, an application with the Department of the Interior for a permit for a right of way across, and for permission to construct and maintain, an electric power transmission line over and across the Coeur d'Alene Indian Reservation. The application was made in pursuance of the provisions of the Act of Congress of March 15, 1901 (31 St. Lg. 790), which act is as follows:

84 "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: Provided further, That all permits given hereunder

for telegraph and telephone purposes shall be subject to the provision of Title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: And provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor
85 in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

The permission so applied for was given by the Secretary of the Interior prior to July 7, 1902—the lands over which the right was given being a part of the Coeur d'Alene Indian Reservation, and then being unsurveyed and not open to settlement. Pursuant to the permission so given, the appellee constructed over and across the Reservation a high tension electric power transmission line extending from Spokane, Washington, to Boise, Idaho, in the Coeur d'Alene Mining District, which line has ever since August, 1903, been used for the purpose of supplying electric power and energy to that mining district. At about the same time the appellee filed a similar application with the Department of the Interior for permission to construct a telephone line over and across the Indian reservation mentioned, under and pursuant to Section 3 of the Act of Congress approved March 3, 1901, entitled "An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes." Under that application the Secretary of the Interior granted the appellee the right to survey, locate, and maintain the telephone line desired, upon the payment of the damages and compensation assessed under his direction, amounting to $224.00, which sum was paid by the appellee into the office of the Commissioner of Indian Affairs. The telephone line was constructed upon the same poles as the electric power transmission line, and is used in connection with and as incidental to the power transmission line. For the purpose of construction and maintaining the lines mentioned, a patrol road was built by the appellee during the years 1902 and 1903, along which its patrolmen pass in patrolling the lines and in keeping the same in repair and available for use. Subsequently and in the year 1906, an act of Congress was passed making provision for the allotment of lands to members of the Coeur D'Alene tribe of Indians within the
86 reservation, and the subsequent opening of the reservation to settlement. Later, and in the year 1910, the appellants made homestead filings upon their respective tracts of land within the reservation over and across which the power and telephone lines had been constructed, and they subsequently made entry and received patents for their said respective tracts of land. Thereafter the appellants denied any right on the part of the appellee to operate or maintain either of the said lines, and interfered with the exercise of those claims of right. Four several actions were brought

by the appellee against the appellants, seeking injunctions restraining them from interfering with the asserted rights, and to establish by decree that the permits granted continued in full force and effect. At the trial the four cases were consolidated and the issues practically reduced to one, which one was and is whether the patents issued to the appellants revoked and cancelled the permits theretofore granted by the Secretary of the Interior to the appellee. The facts were not disputed and each of the appellants admitted that the appellee's plant had been constructed and was in use at the time he first settled upon the land claimed by him.

Ross, *Circuit Judge,* after stating the case:

Not only did the appellants at the time that they settled upon their respective tracts of land have actual notice of the existence and operation of the appellee's transmission and telephone lines and incidental patrol road, but they are properly chargeable with actual knowledge of the law under and by authority of which those lines were constructed and were being operated, and of the right of the appellee to continue to operate them until the permission to do so should be revoked by the Secretary of the Interior; for the statute, as will be seen, in terms so declares. It expressly provides that the power conferred upon the Secretary should be exercised "under general regulations to be fixed by him," of which latter the appellants must be held to have had notice. And the statute itself declares that any permission given by the secretary
87 under the provisions of the act "may be revoked by him or his successor in his discretion, and shall not be held to confer any right or easement or interest in, to, or over any public land, reservation, or park."

The question, thereore, we have to decide, is whether the permits under which the appellee constructed and for years maintained its costly plant, were legally terminated by the issuance of the government's patents to the appellants.

It is conceded—or seems to be conceded, by counsel for the appellants, that had the patents in terms excepted the permits that had been theretofore granted by the Secretary of the Interior in pursuance of the act of Congress that has been referred to, the previously existing rights of the appellee would not have been affected.

The government could not grant, by patent or otherwise, what it did not own, nor anything more than it owned. It owned the fee of the lands upon and over which the appellee's plant was constructed and was being operated subject to the terms and conditions expressly declared in the statute and the regulations of the Interior Department under and pursuant to which such plant was constructed and was being operated, of which record evidence all parties, including the appellants, settlers, and patentees, had full notice. The permission granted to the appellee was subject to revocation at any time by the then Secretary of the Interior or his successor; but that was the sole condition to the continuous existence of the rights

of way granted, and that reserved power on the part of the grantor was never exercised prior to the issuance of the patents to the appellants, nor since, so far as appears. Whether the rights of way could be revoked by the present or any other successor of the then Secretary is not for consideration in the present case.

We see no force in the connection of the counsel for the appellants that the grants of rights of way to the appellee were mere licenses. The Espediente which formed the basis of the claim
88 in De Haro v. United States, 5 Wall. 599, was, as held by the Supreme Court, (pp. 622 et seq.,) nothing more, nor was it intended to be anything more, than a permit to pasture certain land temporarily until the ejidos were measured—in other words, a mere permissive temporary ocupation of land for grazing purposes, which the Supreme Court said in its opinion (p. 627) "the Governor was willing should be in writing instead of by parol, to enable the licensees to enjoy their possession with greater security. And this leads us to a consideration of the law on the subject of licenses." The court then proceeded to declare the law, saying:

"There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works its recovation, and in no sense is it property descendible to heirs. These are familiar and well-established principles of law, hardly requiring a citation of authorities for their vindication; but if they are needed, they will be found collected in the notes to 2d Hare & Wallace's American Leading Cases, commencing on page 376. We are not aware of any difference between the civil and common law on this subject."

It would hardly be contended that the appellee could not have at any time transferred or conveyed its power and telephone lines, with all incidental rights pertaining thereto to some other
89 company or person, or that its rights in the premises would not have passed to its creditors in the event it had been unsuccessful in its business.

We see no merit in the appeal, and, accordingly, the decree is Affirmed.

[File endorsement omitted.]

90 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

Decree.

[Filed July 3, 1922.]

Appeal from the District Court of the United States for the District of Idaho, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Northern Division and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellants.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellants for its costs herein expended, and have execution therefor.

[File endorsement omitted.]

91 At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the city and county of San Francisco, in the State of California, on Monday, the seventh day of August, in the year of our Lord one thousand nine hundred and twenty-two.

Present: Honorable William W. Morrow, Circuit Judge, Presiding; Honorable William H. Hunt, Circuit Judge.

No. 3769.

[Title omitted.]

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable Erskine M. Ross, William W. Morrow and William H. Hunt, Circuit Judges, before whom the case was heard, it is ordered that the Petition, filed July 31, 1922, on behalf of the appellants, for a rehearing of the above-entitled case be, and hereby is denied.

92 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Petition for Appeal.

[Filed Sept. 29, 1922.]

To the Honorable William B. Gilbert, Circuit Judge, a judge of the United States Circuit Court of Appeals for the Ninth Circuit:

The above named defendants and appellants, and each of them, feeling aggrieved by the decree made, rendered and entered in the above entitled consolidated causes, which decree was made and entered on the 14th day of August, 1922, upon the opinion of the above entitled court made and filed on the 3rd day of July, 1922, affirming a decree of the District Court of the United States for the District of Idaho, Northern Division, against these appellants and in favor of appellee and which said decree of the District Court was made on the 26th day of May, 1921, do hereby appeal from said decree of the above entitled court to the Supreme Court of the United States for the reasons set forth in the Assignment of Errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law and that a transcript of the records, proceedings and documents, upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United
93 States sitting at Washington in the District of Columbia under and in accordance with the rules of such court in such cases made and provided. And your petitioners further pray that the proper order relating to the required security to be required of them be made. James F. Ailshie, Attorney for Appellants, Residence and Post Office address, Cœur d'Alene, Idaho.

[File endorsement omitted.]

94 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

[Title omitted.]

Assignment of Errors.

[Filed Sept. 29, 1922.]

Now come the appellants in the above entitled cause and file the assignment of errors upon which they rely upon their prosecution of the appeal in the above entitled cause from the decree of the above entitled Court made and entered on the 14th day of August, 1922, upon the opinion of the said Court made and filed on the 3rd day of July, 1922, affirming a decree of the District Court of the United States for the District of Idaho, Northern Division, against these

appellants and in favor of appellee and which said decree of the District Court was made on the 26th day of May, 1921, and which said assignment of errors is as follows:

I.

That the court erred in affirming the judgment of the District Court and in holding that the complaint herein states causes of action respectively against the appellants.

II.

That the Court erred in holding and decreeing that the permit granted to appellee for a right of way across the lands of
95 appellants, and each of them, for the construction and maintenance of an electric transmission line is a valid and subsisting permit in force and effect since the issuance of patent to appellants.

III.

That the Court erred in holding and decreeing that appellee is the owner of a right of way and easement for a telephone line upon and across the respective lands of these appellants.

IV.

That the Court erred in holding and decreeing that appellee is entitled to maintain a roadway along the power transmission line described in said decree.

V.

That the Court erred in holding and decreeing that appellee is entitled to the use of land within fifty feet of the center of said power line in making repairs and renewals.

VI.

That the Court erred in holding and decreeing that the title of these appellants, and each of them to the lands described in their patents and the decree herein is subject and subservient to any rights of appellee to maintain a power transmission line across the same.

VII.

That the Court erred in holding and decreeing that the permit granted to appellee under the provisions of the Act of Congress of Feb. 15th, 1901 (31 Stat. Lg. 790) was not revoked by the subsequent issuance of unqualified patents to these appellants.

VIII.

That the Court erred in holding and decreeing that the
96 title taken by *appellants* under their patent from the Government was subject to and impressed with a superior right, easement or license granted to appellee by the Secretary of the Interior, prior to the entry of the said lands by appellants and which said permit was granted under the provisions of the Act of Feb. 15, 1901 (31 Stat. Lg. 790).

IX.

The Court erred in not holding that the permit granted to appellee under the Act of Feb. 15, 1901, (31 Stat. Lg. 790) was a mere license revokable at will and that the same was revoked ipso facto by the issuance of patents to homesteaders thereon, and the Court erred in not holding in conformity with the express terms of said Act of Feb. 15, 1901 (31 Stat. Lg. 790) that such permit "shall not be held to confer any right, or easement, or interest in, to or over any public land, reservation or park."

X.

The Court erred in not holding and decreeing that Paragraph 11 of the regulations of the Land Department (31 L. D. 17) which was in force at the time that appellants entered the lands subsequently patented to them was a part of the law in force at the time, and notice to them of the construction the Land Department then placed upon the provisions of the Act of Feb. 15, 1901 (31 Stat. Lg. 790) to the effect that

"The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it effects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department".

XI.

The Court erred upon the whole record in holding and decreeing that appellants were not entitled to the relief asked for de-
97 creeing their respective lands free and clear of any right or easement in favor of appellee. James F. Ailshie, Attorney for Appellants, Residence and P. O. Address, Coeur d'Alene, Idaho.

[File endorsement omitted.]

98 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

[Title omitted.]

Order Allowing Appeal.

[Filed Sept. 29, 1922.]

On motion of James F. Ailshie, attorney and counsel for appellants, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein be and the same is hereby allowed and that a certified transcript of the records, documents and all proceedings upon which said decree was based be duly authenticated and forthwith transmitted to the said Supreme Court of the United States.

It is further ordered that the bond on appeal required by law be fixed at the sum of Three Hundred ($300.00) Dollars.

Dated this 27th day of September, 1922. Wm. B. Gilbert, Circuit Judge.

[File endorsement omitted.]

99 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Bond on Appeal.

[Filed Sept. 29, 1922.]

Know all men by these presents, that we, John Swendig, James W. Miller, Remigius Grab and Anthony Kerr as principals, and the United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound *under* the Washington Water Power Company, a corporation, in the full and just sum of Three Hundred Dollars ($300.00), lawful money of the United States, to be paid to it and its successors and assigns to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators jointly and severally by these presents. Sealed with our seals and dated this 25th day of September, 1922.

Whereas, the above named appellants have obtained, or are about to obtain, an appeal to the Supreme Court of the United States to reverse a decree of the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause;

Now therefore, the condition of this obligation is such that if the above named appellants shall prosecute their said appeal to
100 effect and answer all costs if they fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect. James W. Miller. John Swendig. Remigius

Grab. Anthony Kerr. United States Fidelity & Guaranty Co., By D. M. Cathcart, Its Attorney in Fact. By F. W. Reid, Its Attorney in Fact. Attest: D. M. Cathcart. [Seal.]

The within bond is approved both as to sufficiency and form this 27th day of September, 1922. Wm. B. Gilbert, Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

[File endorsement omitted.]

101 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

[Title omitted.]

Præcipe.

[Filed Oct. 10, 1922.]

To the Clerk of the above-entitled court:

You are hereby requested and directed to prepare a Transcript of the Record on Appeal to the Supreme Court of the United States in the above entitled action of the following papers, records and documents and file in your office, to-wit:

1. The first 80 pages of the printed "Transcript of the Record" used in the above entitled court on the appeal from the District Court of the United States for the District of Idaho.
2. The Opinion of the above entitled court filed July 3rd, 1922, and the order of said court denying appellants' petition for rehearing and the judgment of the above entitled court made and entered on the 14th day of August, 1922.
3. Petition for appeal to the Supreme Court.
4. Order allowing appeal to the Supreme Court.
5. Assignment of Errors.
6. Bond on appeal together with approval thereof.
7. Citation on appeal to the Supreme Court.
8. Minutes of the Court.
9. This Præcipe together with your certificate attached to said Record.

102 You are hereby further requested and directed to certify to the Supreme Court of the United States all exhibits and certified copies of exhibits in said cause, including defendants' exhibits, 1 to 5 inclusive, and plaintiff's exhibits, 1 to 14 inclusive.

Dated this 5th day of October, 1922. James F. Ailshie, Solicitor and Counsel for Appellants, Residing at Cœur d'Alene, Idaho.

Received Copy of above this 6th day of October, 1922. Frank T. Post, Attorney for Appellee, Residing at Spokane, Wn.

[File endorsement omitted.]

103 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3769.

[Title omitted.]

Clerk's Certificate.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing One Hundred and Two (102) pages, numbered from and including 1 to and including 102, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the Assignment of Errors on Appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the Opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to præcipe of counsel for the appellants, filed October 10, 1922, as the originals thereof remain on file and appear of record in my office, and that the same, together with the accompanying, original exhibits, marked as follows:

Plaintiff's 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14; Defendants' 1, 2, 3, 4 and 5;

constitute the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this 16th day of October, A. D. 1921. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk. [Seal of the United States Circuit Court of Appeals, Ninth Circuit.]

104 In the United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

Citation and Service.

[Filed Oct. 4, 1922.]

UNITED STATES OF AMERICA, *ss:*

To the Washington Water Power Company, a corporation, Appellee, and to John P. Gray and Frank T. Post, its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington in the District of Columbia, on the 30th day of November, A. D. 1922, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit from a decree signed and filed and entered on the 14th day of August, 1922, upon the opinion of the said Court made and filed on the 3rd day of July, 1922, affirming a decree of the District Court of the United States for the District of Idaho, Northern Division, made on the 26th day of May, 1921, in favor of appellee, Washington Water Power Company, a corporation, and against appellants, John Swendig, James W. Miller, Remigus Grab and Anthony Kerr, to show cause, if any there be, why the decree rendered against the said appellants and in your favor, as in said order allowing appeal mentioned, should
105 not be corrected and why justice should not be done in that behalf.

Witness the Honorable William B. Gilbert, Circuit Judge, a Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 27th day of September, A. D. 1922. Wm. B. Gilbert, Circuit Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Copy received this 2d day of October, 1922. Frank T. Post, Attorney for Appellee.

[File endorsement omitted.]

Endorsed on cover: File No. 29,223. U. S. Circuit Court Appeals, 9th Circuit. Term No. 673. John Swendig, James W. Miller, Remigus Grab, et al., appellants, vs. The Washington Water Power Company. Filed October 30th, 1922. File No. 29,223.

Supreme Court of the United States

OCTOBER TERM, 1922

NO. [redacted] 142

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, ET AL., *Appellants*,

vs.

THE WASHINGTON WATER POWER COMPANY, *Appellee*.

Appeal From the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANTS

JAMES F. AILSHIE,
Attorney and Solicitor for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1922

NO. 673

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, ET AL., *Appellants*,

vs.

THE WASHINGTON WATER POWER COMPANY, *Appellee.*

Appeal From the United States Circuit Court of Appeals for the Ninth Circuit.

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NO. 673

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vs.

THE WASHINGTON WATER POWER COMPANY, *Appellee.*

Appeal From the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

There is no dispute as to the essential facts of this case. Prior to April 15, 1902, appellee filed an application with the Department of the Interior for authority to construct a telephone line across the Coeur d'Alene Indian Reservation, in the State of Idaho, and authority

was granted by the Secretary on April 15, 1902. This application was made and the authority granted pursuant to the Act of Congress, approved March 3, 1901. (31 Statutes at Large 1083.) (Tr. 2.) The telephone line was constructed under the authority so granted across the lands now owned by appellants.

Prior to July 7, 1902, appellee filed an application with the Department of the Interior for a permit to construct and maintain an electric power transmission line over said Reservation, which permit was granted by the Secretary on July 7, 1902, and the line crossed, among other lands, the lands now belonging to appellants. This application was made and permit granted under authority of the Act of Congress, approved February 15, 1901 (31 Statutes at Large 790.) (Tr. 3.)

Under the above mentioned authority from the Secretary of the Interior and during the year 1903 appellee constructed an electric power transmission line over and across said Reservation and the lands of appellants. About the same time appellee also constructed a telephone line across the Reservation, which latter line simply consisted of wires placed upon the poles of the power transmission line, and since that time appellee has continually maintained and operated both lines and also a patrol road along the same. (Tr. 4.) Although the telephone line has been constructed since 1903, it has never been used by anyone or for any purpose except by appellee in connection with and as an accessory to the power transmission line, and the same was constructed

only for that purpose.

In 1910 the Coeur d'Alene Indian Reservation was thrown open to settlement by Proclamation of the President, under and pursuant to the Act of Congress of June 21, 1906. (34 Stat. L. 335.) On or about May 2, 1910, and after the opening of the Reservation, appellant, John Swendig, made a homestead filing upon the land described as the Northeast Quarter of Section 26, Township 47 North, Range 3, West of Boise Meridian, Idaho, and thereafter made final proof and on the 13th day of October, 1913, received a patent from the United States for such land. (Tr. 5.) On or about the 7th day of May, 1910, appellant, Remigus Grab, made a homestead filing upon the land described as the Northeast Quarter of Section 24, Township 47 North, Range 3, West of Boise Meridian, Idaho, and thereafter made final proof and on the 24th day of September, 1912, received a patent from the United States to said land. (Tr. 9.) On or about the 4th day of May, 1910, appellant, James W. Miller, made a homestead filing upon the land described as the North Half of the Southwest Quarter and the East Half of the Northwest Quarter of Section 26, Township 47 North, Range 3, West of Boise Meridian, Idaho, and thereafter made final proof and on the 23rd day of January, 1914, received a patent from the United States to the above described land. (Tr. 8.) On or about the 22nd day of December, 1910, appellant, Anthony Kerr, made a homestead filing upon the land described as Lot 2 and the Southeast Quarter of the Northwest Quarter

and the Southwest Quarter of the Northeast Quarter and the Northwest Quarter of the Southeast Quarter of Section 19, Township 47 North, Range 2, West of Boise Meridian, Idaho, and thereafter made final proof and on the 15th day of October, 1918, received a patent from the United States for this land. (Tr. 9-10.)

Each patent to the above described land is absolute on its face and makes no reservation whatever of appellee's pretended right of way, and under these absolute conveyances each appellant has at all times objected to the use of said right of way across his land on the ground that appellee has no permit or right to operate and maintain said lines there across.

Appellee brought separate action against each appellant for the purpose of securing an injunction and prays the court as follows:

> "That this Court may issue its injunction perpetually enjoining and restraining the said defendant and all persons acting under his authority or pretending so to act, and all successors in interest of said defendant, from interfering with this plaintiff in operating and maintaining the said electric power transmission line and said telephone line and said patrol road over and across" the respective land of each defendant, "and from passing along and over the said patrol road."

The appellants each filed their motions in the trial court to dismiss the actions, on the ground that the complaint fails to state facts sufficient to constitute a cause of action. (Tr. 21-22.) These motions were overruled by the trial court (Tr. 22-23), and the decision of the

trial court was based upon the case of Washington Water Power Co vs. Harbaugh (253 Fed. 681), a previous decision of the same court. The case went to trial, and documentary evidence and oral testimony was introduced, and the court thereupon entered a decree in favor of appellee as prayed for, and "perpetually enjoined and restrained (defendants) from interfering with the plaintiff in the operation and maintenance of the said electric power line," etc. (Tr. 34-37.) Defendants thereupon prosecuted an appeal from the judgment to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of appeals affirmed the judgment of the trial court. See opinion in 281 Fed. 900. For the convenience of the court we are printing a copy of the opinion of the Court of Appeals as an appendix to this brief.

SPECIFICATION OF ERRORS.

In stating our specifications of errors here we will simply endeavor to condense their statement as contained in our assignment of errors filed with the clerk on taking this appeal, and disclosed at pages 44 to 46, inclusive, of the transcript in this court.

I.

The court erred in holding and decreeing that the permit granted to appellee for a right of way across the lands of appellants, and each of them, for the construction and maintenance of an electric transmission line is a valid and subsisting permit in force and effect since the issuance of patent to appellants; and erred in holding and decreeing that the title of these appellants, and each

of them, to the lands described in their patents and the decree herein is subject and subservient to any rights of appellee to maintain a power transmission line across the same.

II.

The court erred in holding and decreeing that the permit granted to appellee under the provisions of the Act of Congress of Feb. 15, 1901 (31 Stat. L. 790) was not revoked by the subsequent issuance of unqualified patents to these appellants; and erred in holding and decreeing that the title taken by appellants under their patent from the government was subject to and impressed with a superior right, easement or license granted to appellee by the Secretary of the Interior, prior to the entry of the said lands by appellants and which said permit was granted under the provisions of the Act of Feb. 15, 1901 (31 Stat. L. 790).

III.

The court erred in not holding that the permit granted to the appellee under the Act of Feb. 15, 1901 (31 Stat. L. 790) was a mere license revocable at will and that the same was revoked ipso facto by the issuance of patents to homesteaders thereon, and the court erred in not holding in conformity with the express terms of said Act of Feb. 15, 1901 (31 Stat. L. 790) that such permit "shall not be held to confer any right, or easement, or interest in, to or over any public land, reservation or park."

IV.

The court erred in not holding and decreeing that paragraph 11 of the regulations of the Land Department (31 L. D. 17), which was in force at the time that appellants entered the lands subsequently patented to them as a part of the law in force at the time, and notice to them of the construction the Land Department then placed upon the provisions of the Act of Feb. 15, 1901 (31 Stat. L. 790), to the effect that "The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it effects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department." (31 L. D. 17.)

V.

The court erred in holding and decreeing that appellee is the owner of a right of way and easement for a telephone line upon and across the respective lands of these appellants; and erred in holding and decreeing that appellee is entitled to maintain a roadway along the power transmission line described in said decree.

ARGUMENT.

I.

UNDER ACT OF CONGRESS APPELLEE ACQUIRED NO EASEMENT, INTEREST OR TITLE, BUT ONLY A LICENSE.

The language used in the Act of Congress of Feb-

ruary 15, 1901, under which appellee received a permit to operate and maintain its electric power transmission line, is unambiguous and would seem to admit of but one construction. It clearly states that the Secretary of Interior cannot grant, and a grantee cannot acquire, *any interest* whatever in the land across which the grantee acquires permission to maintain and operate electric power and transmission lines.

The statute involved reads in part as follows:

> "That the Secretary of the Interior be, and hereby is, authorized and empowered, *under general regulations to be fixed by him*, to permit the use of rights of way through the public lands, forests and other reservations * * * for electrical plants, poles, and lines for the generation and distribution of electrical power * * * to the extent of the ground occupied by such * * * electrical or other works permitted hereunder * * * And provided further, that any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and *shall not be held to confer any right, or easement, or interest in, to or over any public land, reservation or park.*" (31 Stat. at L. 790.)

As the grantee acquired no *"right,* or *easement,* or *interest in, to or over"* the land in question, and still had a right under the permit granted by the Secretary of the Interior, to *operate and maintain* an electric power and transmission line across the Coeur d'Alene Indian Reservation, then the permit, revocable at the option and in the discretion of the Secretary of the Interior, could be nothing greater than a mere *revocable license.* Appellee does not claim that it has any *easement* over the land in

question, but does claim that it has the *right to "operate and maintain said lines under the permit heretofore mentioned,"* under the authority of the Land Department of the United States. In other words, the appellee claims that the permit, granted to it by the Secretary of the Interior, to operate and maintain its transmission line across the Coeur d'Alene Indian Reservation, is *still existing and operative* and that the authority gives it a *right to continue to operate* and maintain this transmission line over appellants' lands.

Now, as the appellee never had anything more than a mere revocable license to operate and maintain its transmission line across the Coeur d'Alene Indian Reservation, its present rights must be construed and must depend upon the same construction as the rights of any other individual operating under a revocable license, and its rights may be extinguished in the same manner and under the same condition as those of a *licensee under a private individual.* The appellee does not maintain, nor could it successfully maintain that the United States could not have revoked its permit at any time prior to issuing patents to appellants. The Land Department specifically reserved the right to cut off appellee's permit or license at its option.

Hence if the United States could revoke this permit or license at its option, then clearly any act on the part of the United States, which shows an intent to revoke such permit, or *which is inconsistent with the continued existence thereof,* must ipso facto revoke appellee's license

to operate and maintain its transmission line.

Evidently any act of the government which withdraws the lands from the category of *"public land, reservation or park"* terminates the permit, since such permit can only be granted over *such lands.*

There is, therefore, one decisive question involved in this case, and that is:

Does the subsequent conveyance of land by the United States by a patent absolute on its face, ipso facto, revoke a permit issued by the Secretary of the Interior, under the authority of the Act of Feb. 15, 1901, *for the construction of a power transmission line over such land at a time when it was in an Indian Reservation?*

It has apparently been admitted by all concerned thus far in the case that any permit issued under the Act of February 15, 1901, is a mere *revocable license.*

This Act authorizes the Secretary to *permit a right of way* through the *public lands* of the United States for certain purposes. This statute does not deal with the subject of *transferring title* to the settlers or reserving rights in the patents issued to them, and does not deal or purport to deal with the lands after they have been earned and are passing by patent to individuals. It clearly refers alone to a mere license (permit) to cross the public lands *so long as they are public lands.*

This is evidenced by the further language of the act which expressly provides that *any permission* given by

the Secretary under the provisions of this Act may be revoked by him in his discretion and shall not be held to confer any *right* or *easement* in, to or over the *public lands*. Does this statute, giving a mere revocable permit over the *public lands*, which creates no right or easement, have anything to do with, or is it any kith or kin either in law or fact, to an exception in a patent conveying land to a private party? The answer seems obvious.

II.

ISSUANCE OF A PATENT REVOKES A LICENSE.

It is an elementary principle of law that in order for a license to exist the licensor must have some right to or interest in the thing upon which the license is to operate, and that when such right or interest of the licensor is extinguished, so also is the license extinguished. It appears to have been uniformly held that an absolute conveyance of land revokes any license to the use thereof.

In the case of De Haro vs. U. S., 5 Wall. 599 (18 L. E. 681), this court lays down the rule in the following language:

> "There is a clear distinction between the effect of a license to enter land, uncoupled with an interest and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains

unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party and cannot be transferred or alienated by the licensee, because it is a personal matter, and *is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it property descendible to heirs. These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication;* but if they are needed, they will be found collected in the notes to 2d Hare & Wallace's American Leading Cases, commencing on page 376. We are not aware of any difference between the civil and common law on this subject.'

The author of the text in 18 Am. & Eng. Encyc. of Law, at page 1141, states the rule as follows:

> "As a license is terminated by *any act of the licensor which shows an intention to revoke it, a conveyance by the licensor of some interest in the land inconsistent with the continued enjoyment of the license operates as a revocation* even if the license was granted upon a consideration."

A great many authorities could be cited upon this question, all holding as the above, but as was said in the De Haro case, "These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication."

The very fact that Congress authorized the granting of the permit or license here involved, and also left it within the discretion of the Secretary to grant or refuse to grant the permit, very strongly indicates the thought of Congress in attaching this condition that it might not be wise or expedient to grant such authority to some

companies or individuals, whereas he might safely grant such permit to others. In other words, the responsibility, integrity and financial standing of the applicant might be almost controlling, and at the same time the assignee or grantee of some permittee might not have such standing.

Great Falls Waterworks Co. vs. Gr. Northern Ry. Co., 54 Pac. 963-966.
Minneapolis W. Ry. Co. vs. Minnesota & St. L. Ry. Co., 59 N. W. 983.
Hodgkins vs. Farrington, 22 N. E. 73.
Jones on Easements, Sec. 69.
Banks vs. Brooks, 169 N. W. 920; 172 N. W. 582.
25 Cyc. 640.

It is also established by an unbroken line of authorities that when a patent, absolute upon its face, has been issued by the Land Department and delivered and accepted by the patentee, the title of the United States goes with it and all right to control the title or land or to decide on the right to the title has passed from the Land Office and from the Executive Department of the Government.

22 R. C. L., page 275, par, 37.
United States vs. Carl Schurz, 12 Otto 378; 26 U. S. (L. E.) 167.
Moore vs. Robbins, 6 Otto 530; 24 U. S. (L. E.) 848.
Iron Silver Mining Company vs. Campbell, 135 U. S. 286; 34 U. S. (L. E.) 155.
Stone vs. United States, 2 Wall. 525; 17 U. S. (L. E.) 765.
In United States vs. Schurz (Supra) the court says:

"From the very nature of the functions performed by these officers (officers of the Land Department)

and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings *their authority in the matter ceases.*

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of the title has been performed. Whenever this takes place the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government and the power of these officers to deal with it has also passed away."

In Moore vs. Robbins (supra) the court says:

"While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that *when the patent has been awarded to one of the contestants and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the Land Office. Not only has it passed from the Land Office, but it has passed from the Executive Department of the Government.*

A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the Department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public lands; and it is a part of their daily business to decide when a party has by purchase, by pre-emption or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and

the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. *With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed.* * * * But in all this there is no place for the further control of the Executive Department over the title. *The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance, where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, sealed and delivered to and accepted by the grantee.*"

Then, under the established principles of the law, as shown by the above authorities, at the time that the Land Department issued the patents to these appellants, it conveyed all the interest of the United States, and all the right of the Executive Department of the government to exercise any control or authority over the title or land passed by these grants. There are, therefore, two reasons why the appellee's right to maintain and operate its electric power transmission line over the lands in question was necessarily extinguished:

First, the conveyance of an absolute title to appellants clearly showed an intent on the part of the Land Department to revoke this permit or license, and we think did revoke it, and, second, even if the Land Department did not intend to so extinguish the rights of plaintiff, it placed all control and authority over the lands now belonging to defendants *out of its power when the patents were granted*, and the Executive Department of the gov-

ernment has no interest in the land whatever. *There is nothing belonging to the government left upon which a license or permit by the Land Department can operate,* and the law makes no provision for the operation of a license when the licensor has no interest upon which the license can operate.

It seems self-evident that the grants of the government to appellants had the legal effect of *either revoking the permit of appellee, or else they transferred to appellants the right to revoke it.* Certainly the United States as grantor *reserved no right or power to either revoke* the permit *as to these lands* or to further *regulate* or *control* it over these tracts of land. If the Government cannot revoke it, and the appellants cannot revoke it, then it must have *by some process become a vested right,* and appellee has secured a perpetual right to operate and maintain its lines across a great many miles of land, similarly situated to that of these appellants, *for nothing,* and now alleges that its permanent right under the permit is worth $25,000.00. (Tr. 3.)

What power has the Secretary of the Interior over these lands after the delivery of the patent? *This land is deeded absolutely to the settler.* It has passed beyond the control of the government, and the relative rights of the settlers and the Washington Water Power Company under this patent are now controlled *solely and alone by the law of thte State relative to real estate.*

III.

REGULATION OF THE LAND DEPARTMENT AND

RIGHTS OF APPELLANTS THEREUNDER.

At the time these lands were thrown open to entry in May, 1910, the rules and regulations of the Land Department provided that the issuance of a patent to lands covered by an outstanding permit under this statute revoked the permit. Paragraph 11 of the then governing regulations (31 L. D. 17) provided inter alia:

> *"The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract,* and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department."

The foregoing provisions establish the fact that at the time the Coeur d'Alene Indian Reservation was thrown open to settlement the regulations of the Land Department provided that a patent issued to a settler would revoke any permit outstanding on the land under this statute. *This regulation was in effect at the time each of these appellants made homestead entry upon their respective lands.* (Tr. 5, 8, 9, 10.) It was also in effect when Grab made final proof June 24, 1912 (Tr. 9).

The Land Department changed these regulations (41 L. D. 152) in August, 1912, but if it be granted that the Department did have authority or power to change the construction of this statute, which we urge it *did not,* it could not do so in any manner to affect the *rights of these appellants which were initiated and date from the time of their entry of the land in* 1910, when the regu-

lation for cancellation was in effect.

IV.

LAND CEASES TO BE PUBLIC AFTER ENTRY.

Entry by a settler upon public land and the receipt of a certificate of entry from the Land Department instantly segregates such land from the public domain and when patent subsequently issues it takes effect as of the date of such entry.

In the case of Witherspoon vs. Duncan, 4 Wall 210 (18 L. Ed. 339), this court used the following language:

> "In no just sense can lands be said to be *public lands* after they have been entered at the land office and a certificate of entry obtained. If *public lands* before the entry, after it they are *private property.* If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer, and is a void act.
>
> "According to the well-known mode of proceeding at the land offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and *thereafter the land ceases to be a part of the public domain.*"

To the same effect see:

Wirth vs. Branson, 98 U. S. 118, 25 L. Ed. 86.
Cornelius vs. Kissel, 128 U. S. 456, 32 L. Ed. 482.

Clearly under the foregoing authorities, even if the Land Department had the power or authority to *misin-*

terpret the Act of Congress and make such regulations, they would in nowise affect the previously initiated rights of these appellants. Their rights were established in 1910, when they made entry on this land. Any act of the Department subsequent thereto tending to change or alter such rights would be in excess of jurisdiction and void. It would be depriving these appellants of their property without notice or chance to protest. Under the regulation in effect at the date of their entry upon this land appellants had a right to believe that the subsequent issuance of patents to them would revoke the permit of appellee and would give appellants title to all the land which they had purchased free from any servitude of appellee's power line.

This identical question came up before the Land Department in a case wherein appellee was also a party. The case is entitled John A. Nye et al. ,vs. Washington Water Power Co., and the opinion (Defendants' Ex. 5) was written by Secretary Fall. In this opinion the Secretary, after quoting the regulation in effect in 1910, used the following language:

> *"Settlers, or entrymen, were therefore warranted in believing that when they had complied with the law and patent had issued, the prior permit or license granted would terminate as to the lands so patented."*
>
> (D-46785 of April 23, 1921.)

With such regulation in effect when these appellants made their respective homestead entries, and paid for this land, it would violate the well settled principles of

equity and justice to permit the regulation, dated August 24, 1912, to be effective as against them if it should be conceded that the Department under any circumstance had the authority to promulgate such a rule. They are the purchasers of this land and, as Secretary Fall said,

> "were therefore warranted in believing that when they had complied with the law and patent had issued, the prior permit or license granted would terminate as to the lands so patented."

This regulation of 1912, if effective, would deprive them of part of that which they had purchased. This would not seem to be either justice or law.

Upon first impression it might seem that to hold the subsequent conveyance of these lands to appellants revoked appellee's permit would work a hardship upon appellee, in view of the fact that it has expended a certain amount of money in constructing this power line. Upon closer examination, however, such question would seem to be of no consequence and could certainly give appellee no right against these appellants, who are bona fide purchasers of this land from the United States.

V.

MERE OCCUPATION AND IMPROVEMENT OF PUBLIC LAND DOES NOT CONFER A VESTED RIGHT IN THE LAND SO OCCUPIED, SO THAT THE OCCUPANT CAN MAINTAIN A RIGHT OF POSSESSION AGAINST THE UNITED STATES OR THE GRANTEE OF THE UNITED STATES.

In the case of Northern Pacific Railway Co. vs. Smith, 171 U. S. 260; 43 L. Ed. 157, this court had under consideration a question arising out of a settlement upon public land with the view of locating a townsite thereon. The party had already built houses on the particular property, but had made no application to the Land Department. Later the land in question was granted to defendant railroad company. The court in deciding that case used the following language:

> "It has frequently been decided by this court that mere *occupation and improvement* on the public lands, with a view to pre-emption, *do not confer a vested right in the land so occupied;* that the power of Congress over the public lands, as conferred by the constitution, *can only be restrained by the courts in cases where the land has ceased to be government property* by reason of a *right vested in some person or corporation*, that such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchasers. If then, one seeking to appropriate to himself a portion of the public lands cannot, *no matter how long his occupation or how large his improvements*, maintain a right of possession against the United States or their *grantees*, unless he has by entry and payment of purchase money, *created in himself a vested right*, is one who claims under a townsite grant in any better position?"

In the case of Johnson vs. Drew, 171 U. S. 94; 43 L. Ed. 88, the Supreme Court of the United States said:

> "It being so a part of the *public domain*, subject to the administration by the Land Department and to disposal in the ordinary way, the question arises whether a party *can defend against a patent duly issued therefor upon an entry made in the local land*

office on the ground that he was in actual possession of the land at the time of the issue of the patent? *We are of the opinion that he cannot.* It appears from the testimony that the defendant, *although in occupation of this land*, as he says, from 1871, never attempted to make any entry in the local land office, never took any steps to secure a title, and, in fact, did nothing until after the issue of a patent, when he began to make inquiry as to his supposed rights."

To the same effect see:

Frisbie vs. Whitney, 76 U. S. 187; 19 L. Ed. 668.
Gonzales vs. French, 164 U. S. 339; 41 L. Ed. 458.
Hutchings vs. Low, 82 U. S. 77; 21 L. Ed. 82.
Steel vs. St. Louis Smelting & Refin. Co., 106 U. S. 447; 27 L. Ed. 226.

In the present case appellee does not appear to claim any vested right in this land by means of any grant or conveyance, and there is no showing that it ever took any steps to acquire title to or an easement for this right of way, although it had notice that appellants were purchasing it, and under the above authorities it seems clear that appellee's mere occupancy and construction of its power line across this land *did not give it any right against the United States and does not give it any right against these appellants, who are bona fide purchasers from the United States.*

VI.

NO ESTOPPEL AGAINST GOVERNMENT OR ITS GRANTEE.

The principle that one should be estopped from asserting a right to property upon which he has, by his con-

duct, misled another cannot be invoked against the United States, or by one who, at the time the improvements were made, was acquainted with the true character of his title or with the fact that he had none.

In the case of Steel vs. St. Louis Smelting & Refining Co., 106 U. S. 447; 27 L. Ed. 226, this court had under consideration a case wherein plaintiff had acquired a mineral patent to lands claimed by defendant under a conveyance as part of a townsite on the public domain. Plaintiff set up its title and defendant alleged that the land had been occupied as a townsite for more than 19 years prior to the patent of plaintiff; that the plaintiff's assignor had lived in the town for nineteen years and was cognizant of the fact that large amounts of money had been expended by defendant and was being expended by defendant, amounting to over $5,000.00, and had never made any objection thereto nor informed defendant of his rights. Demurrer to this answer was sustained by the lower court, and in considering the question this court said:

> "These allegations are very far from establishing such an equity in the defendants as to estop the patentee and those claiming under him, from asserting the legal title to the premises. These matters *could not operate to estop the government in any disposition of the land* it might choose to make. Its power of alienation could not be affected until the defendants had performed all the acts required by law to acquire a *vested interest in the land*, and it is not pretended that they took any steps to secure such an interest. Whatever right, therefore, the government possessed, to use or dispose of the property, freed from any claim of the defendants, it could

pass on to its grantee.

"The principle invoked is that one should be estopped from asserting a right to property upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate, stands by and sees another erect improvements on it, in the belief that he has the title or an interest in it, and does not interfere to prevent the work, or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case, will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements. *But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title or with the fact that he had none.*"

See also:

Henshaw vs. Bissell, 85 U. S. 255; 21 L. Ed. 835.
Brant vs. The Virginia Coal & Iron Co., 93 U. S. 326; 23 L. Ed. 927.

In this case there is not a scintilla of showing that would even tend to establish estoppel. Appellee knew at the time it was constructing its line over this land that it did not have any interest therein and *it further knew that a subsequent patent to such land would cut off the permit* under which it was operating. The regulations of the Department there in force so advised it. (Par. 11, at p. 17 of 31 L. D.) With knowledge of these facts it went ahead and built its line.

VII.

ASSUMPTION OF LOWER COURT ERRONEOUS.

As it appears to us, the lower court committed the basic error of assuming that notwithstanding the act of Congress, the appellee acquired some kind of *title or interest* in this land when the Secretary gave it a *permit* to build its line across the Indian Reservation (Reported in 281 Fed. 900). The court predicated its consideration of the case upon the statement: "The Government could not grant, by patent or otherwise, what it did not own, nor anything more than it owned." This principle is axiomatic and yet its statement in this connection could have no place except upon the assumption that the Government had *previous to issuance of patent sold, granted or in some way transferred* to appellee a *right of way over this land.* The Secretary acquired only such authority over the land as Congress had conferred upon him. On the other hand, Congress had *instructed him, and all persons dealing with him,* by the very parting admonition of the act (Act February 15, 1901), that any permit he might give "*shall not be held to confer any right or easement or interest in, to or over any public land, reservation or park.*" What other or more direct language could Congress have used than it did use to preclude all notion or possibility of any kind of *property interest in, to or over* the land passing from the Government by a permit? The intent of Congress appears clear beyond doubt. The words "*right* or *easement* or interest" cover all the property rights that can exist in real estate, and the words "*in, to* or *over*" cover *all manner* and *form of interest, right of possession* or property right. Something else must be read into this Act in order to give a

permittee an interest *in, to* or *over* the land. Now if the Washington Water Power Company, at the time appellants made their entry and later secured their patent, did not have "*any right or easement or interest in*" this land and did not have any "*right to or over*" this land, *then what was it that appellee had* that the *government could not grant* or convey by patent? *This pertinent legal inquiry cannot be answered by the mere statement of the axiom that a grantor cannot grant any more than he owns.* Pursuing the foregoing assumption the court further said:

> "It owned the fee of the lands upon and over which the appellee's plant was constructed and was being operated, subject to the terms and conditions expressly declared in the statute and the regulations of the Interior Department under and pursuant to which such plant was constructed and was being operated, of which record evidence all parties, including the appellants, settlers and patentees, had full notice. The permission granted to the appellee was subject to revocation at any time by the then Secretary of the Interior or his successor; but that was the sole condition to the continuous existence of the rights of way granted, and that reserved power on the part of the grantor was never exercised prior to the issuance of the patents to the appellants, nor since, so far as appears. Whether the rights of way could be revoked by the present or any other successor of the then Secretary is not for consideration in the present case."

The patents which issued to appellants conveyed to them the *unqualified fee* in the lands without any reservations of any kind. Now it seems from the opinion of the Court of Appeals that notwithstanding the unqualified terms of the patents themselves the title they convey

is limited and the lands thus granted are, nevertheless, burdened with a continuing *servitude.* The holding of the lower court at once raises the inevitable and legitimate inquiry: If this so-called permit or license remained in force *after* the patent was issued, *in whom remained the power to revoke it? Was it left in the Secretary or transferred* with the patent *to the patentee?* If the issuance of this unqaulified patent did not either *revoke the permit* or transfer the power to do so to the grantee then certainly the holder of the Secretary's permit had in some way acquired some "*right, easement* or *interest*" in these lands contrary to the express will of congress.

The trial court rested his decision in this case upon a previous decision by the same court rendered in the case of Washington Water Power Co. vs. Harbaugh, 253 Fed. 681. In that case it will be seen that the court invoked the doctrine of estoppel against Harbaugh, the patentee of the government. The court there said:

> "It is hardly possible to contend that the defendant was *in any wise misled to his injury.* Admittedly he knew that the plaintiff was maintaining and operating the transmission line, and *so far as appears* he was willing to purchase the property subject to such right as it then had. When he made his offer he had no assurance or intimation that a patent would be issued without a notation referring to the right of way. Accordingly it is held that *neither the integrity nor the extent of the plaintiff's right* was affected by the issuance of the patent."

Was it not just as reasonable, and more in keeping with the established rules of law and practice for the

homesteader to suppose that after advertising to prove up on his homestead any one who claimed a superior or adverse right in the land would appear and make his protest and that any mere *revocable license* held by any one would be terminated upon the issuance of patent? *Why* should the homesteader suppose or have reason to believe for a moment that the *uniform and well established* rule or law *that a conveyance of the fee* title revokes a license would or could be set aside or disregarded in his case? Can any one truly say that the homesteader would have taken this tract of land had he been apprised that this *license* would be construed to be in *effect an easement?* *Why* should the homesteader suppose for a moment that any reservations not directed or required by law would be made in his patent? And if none was made, why should he suppose the omission was a *mistake* or an inadvertence? The trial court, in effect, corrected these patents in a collateral proceeding to make them read as if a reservation had been made therein of appellee's permit.

VIII.

APPELLEE'S TELEPHONE LINE.

What has been said relative to appellee's power transmission line applies with equal force to its telephone line. While appellee claims the right to operate and maintain this telephone line pursuant to a permit or grant under the prosivions of the Act of March 3, 1901 (31 Stat, at Large 1083), an examination of this act clearly shows that appellee could not acquire the

right asserted here under said act and that the Secretary of the Interior *was without jurisdiction or authority* to issue or grant such right *in view of the facts that existed.* In the first place, it is conceded that this application was made and the telephone line constructed and is maintained for *appellee's use only,* and that the same is in *no sense maintained for the benefit of the public at large* and is used only as an accessory or incident to appellee's *power transmission line.* The Act of March 3, 1901 (31 Stat. at Large 1083) applies only to telephone lines operated *for the use and benefit of the public at large,* where the company operating the same is doing so *as a business and charges tolls* and not for its own private use as an accessory to some other business. This is shown from the wording of the Statute itself. The portion of the Statute pertinent reads as follows:

> "The Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation and maintenance of telephone and telegraph lines and *offices for general telephone and telegraph business* through any Indian Reservation * * * *and Congress hereby expressly reserves the right to regulate the tolls or charges for the transmission of messages* over any lines constructed under the provisions of this Act."

The above quoted language is so clear as to the purpose of the law that further discussion seems unnecessary. In view of the foregoing provisions of the act it seems clear that the appellee could not and did not acquire any right under the Act of March 3, 1901 (31 St. at Large 1083) and that the so-called grant for a right of way for

a telephone line was wholly ineffective and void.

It would appear, therefore, that if appellee is authorized to operate and maintain this telephone line at all, it must do so under the permit granted pursuant to the Act of February 15, 1901, for its right of way for the power transmission line and as an accessory to such transmission line, and the right of way for the telephone line must stand or fall with the permit for the power transmission line.

IX.

APPELLEE SHOULD PAY JUST COMPENSATION FOR EASEMENT.

Some stress has been laid upon the contention that the Washington Water Power Company, and other similar corporations, have constructed expensive plants and made heavy investments in constructing their transmission lines over public lands, and that to now hold that the subsequent conveyance of these lands revokes the permit or license to maintain such transmission lines would work a hardship upon the companies making such investments. That contention is wholly without merit and, we believe, unworthy of consideration in this case. Since, however, it has been stressed both upon the argument of this case in the lower court and by the opinion of the Circuit Court of Appeals we should, perhaps, give it some consideration here. Appellee has never paid anything for a right of way or easement for its transmission line through the Coeur d'Alene Indian Reservation or

over the lands of appellants. Notwithstanding that fact, it has had the use of this right of way, which it values at more than $30,000 (Tr. 3), for more than twenty years. It is a public service corporation under the laws of the state of Idaho (Sec. 2396 Idaho C. S.), and in fixing rates which it charges to consumers and the public it undoubtedly places a valuation upon its easements and right of way and is allowed to collect rates thereon (Murray vs. Pub. U. Comm., 27 Idaho 603). It is manifestly unjust to allow this public utility a free easement and right of way on which it may collect rates, while its competitor, which comes in after these lands have passed into *private ownership*, will be obliged to purchase or condemn an easement and right of way and pay a just compensation therefor as provided by the Constitution and laws of Idaho. It is also manifest that appellee had notice at the time it procured its *permit* and thereafter constructed its works and transmission line that the Act of February 15, 1901, prohibited it from acquiring *"any right or easement or interest in, to or over any public land"* through which it might construct its line under such permit. Such companies as appellee are not taken unawares, but make their investments with their eyes open and in the full knowledge of the law. What the Washington Water Power Company is now seeking to avoid is the purchase or condemnation of its easement and right of way across these privately owned lands and pay just compensation therefor as provided by the Constitution and Statutes of the State of Idaho (Idaho Const. Sec. 14, Art. 1; Compiled Statutes of Idaho, Sec. 7404, subd. 6; Hollister vs.

State, 9 Ida. 8).

We believe we are safe in saying that every state in the Union in which a permit has been granted by the Secretary under the provisions of the Act of February 16, 1901, has either a constitutional or statutory provision authorizing the acquisition of easements and rights of way for electric power and light transmission lines under the power of eminent domain. So we repeat, that *appellee has no cause to complain if it finds itself under the necessity of actually purchasing, and paying for, its easement and right of way or condemning it under the eminent domain statute.* It will then be doing only what the law requires its competitors and all other public service corporations to do. It will be paying for the property it has thus far enjoyed as a public gratuity.

We most respectfully submit that the judgment of the Trial Court and the decision of the Circuit Court of Appeals should be reversed and the cause should be remanded with instructions to the lower court to dismiss appellee's actions and that appellants recover their costs.

Respectfully submitted,

JAMES F. AILSHIE,

Attorney and Solicitor for Appellants.

Coeur d'Alene, Idaho.

Ross, Circuit Judge, after stating the case.

Not only did the appellants at the time that they settled upon their respective tracts of land have actual notice of the existence and operation of the appellee's transmission and telephone lines and incidental patrol road, but they are properly chargeable with actual knowledge of the law under and by authority of which those lines were constructed and were being operated, and of the right of the appellee to continue to operate them until the permission to do so should be revoked by the Secretary of the Interior; for the statute, as will be seen, in terms so declares. It expressly provides that the power conferred upon the Secretary should be exercised "under general regulations to be fixed by him," of which latter the appellants must be held to have had notice. And the statute itself declares that any permission given by the Secretary under the provisions of the act "may be revoked by him or his successor in his discretion, and shall not be held to confer any right or easement or interest in, to or over any public land, reservation or park."

The question, therefore, we have to decide is whether the permits under which the appellee constructed and for years maintained its costly plant, were legally terminated by the issuance of the government's patents to the appellants.

It is conceded—or seems to be conceded, by counsel for the appellants that had the patents in terms excepted the permits that had been theretofore granted by the Secretary of the Interior in pursuance of the Act of Congress that has been referred to, the previously existing rights of the appellee would not have been affected.

The government could not grant, by patent or otherwise, what it did not own, nor anything more than it owned. It owned the fee of the lands upon and over which the appellee's plant was constructed and was being operated subject to the terms and conditions expressly declared in the statute and the regulations of the Interior Department under and pursuant to which such plant was constructed and was being operated, of which record evidence all parties, including the appellants, set-

tlers and patentees, had full notice. The permission granted to the appellee was subject to revocation at any time by the then Secretary of the Interior or his successor; but that was the sole condition to the continuous existence of the rights of way granted, and that reserved power on the part of the grantor was never exercised prior to the issuance of the patents to the appellants, nor since, so far as appears. Whether the rights of way could be revoked by the present or any other successor of the then Secretary is not for consideration in the present case.

We see no force in the contention of counsel for the appellants that the grants of rights of way to the appellee were mere licenses. The Espediente which formed the basis of the claim in De Haro vs. United States, 5 Wall. 599, was, as held by the Supreme Court (pp. 622 et seq.) nothing more, nor was it intended to be anything more, than a permit to pasture certain land temporarily until the ejidos were measured—in other words, a mere permissive temporary occupation of land for grazing purposes, which the Supreme Court said in its opinion (p. 627) "the Governor was willing should be in writing instead of by parol, to enable the licensees to enjoy their possession with greater security. And this leads us to the consideration of the law on the subject of licenses." The court then proceeded to declare the law, saying:

"There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no

sense is it property descendible to heirs. These are familiar and well established principles of law, hardly requiring a citation of authorities for their vindication; but if they are needed, they will be found collected in the notes to 2d Hare & Wallace's American Leading Cases, commencing on page 376. We are not aware of any difference between the civil and common law on this subject."

It would hardly be contended that the appellee could not have at any time transferred or conveyed its power and telephone lines with all incidental rights pertaining thereto to someother company or person, or that its rights in the premises would have passed to its creditors in the event it had been unsuccessful in its business.

We see no merit in the appeal, and, accordingly, the decree is affirmed.

Endorsed: OPINION filed July 3, 1922. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 142.

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, ET AL., APPELLANTS,

vs.

THE WASHINGTON WATER POWER COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF FOR APPELLANTS.

JAMES F. AILSHIE,
Attorney and Solicitor for Appellants.

SUPREME COURT OF THE UNITED STATES.

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REPLY BRIEF FOR APPELLANTS.

We desire to submit a brief reply to some of the contentions made in appellee's brief and call attention to the authorities cited therein.

The Circuit Court of Appeals in its opinion says:

> "It is conceded—or seems to be conceded, by counsel for the appellants, that had the patents in terms excepted the permits that had been theretofore granted

> by the Secretary of the Interior in pursuance of the act of Congress that has been referred to, the previously existing rights of the appellee would not have been affected."

This is quoted in appellee's brief in this court apparently for the purpose of conveying the idea that we have made an important admission which militates against our contention. In our petition for a rehearing we called the court's attention to this statement and said:

> "The court must have misapprehended the position we have taken as we have never intended to concede or seem to concede that it was ever within the power of the Secretary of the Interior to have issued a fee simple patent to this tract of land and at the same time to have reserved this license or permit right to either the government or the appellee. Under the land laws as enacted by Congress and the proclamation of the President extending them to the Cœur d'Alene Indian Reservation it became the absolute duty of the land department to either issue patents to these homesteaders upon their complying with the homestead laws or refuse to issue them. Congress had already told the Secretary, and everyone else, that any permits issued under the Act of February 15, 1901, *'shall not be held to confer any right or easement or interest in, to or over any public land.'* "

In the case at bar the Department made no attempt at noting any reservation, and indeed we do not think it was the intention of the Department at the time to reserve this right to appellee, but we believe and so contend that the Department *had no right* and never had a right to issue a patent to a homesteader and at the same time reserve from the lands

patented an easement or right of way for the purposes for which appellee had secured this permit. The Congress, in the passage of the Act of February 15, 1901, was dealing solely with lands while they retained the character and status of "public lands, reservations and parks." When this land ceased to be public land and passed into private ownership under the homestead laws, it passed out from under the operation of the Act of February 15, 1901. By the Act of June 22, 1906, Congress directed the President to cause the Cœur d'Alene Indian Reservation to be surveyed and allotted to the Indians and directed that all land remaining in that reservation after the allotments should thereupon by proclamation of the President be thrown open to entry under the general homestead laws of the United States. After these lands were opened to settlement under the proclamation of the President it became the duty of the Department to issue patents to entrymen who complied with the law and earned the lands. It was not within the power of any department of government to make any reservations in the patents so issued except as directed and prescribed by Congress.

A letter from the Secretary of the Interior dated August 23, 1912, is cited and relied upon by appellee, wherein the Secretary attributes to Congress a purpose in the passage of the act in question, which to us seems entirely contrary to the express declaration of the act.

He says: "To effectuate the purposes of the statute, it is necessary too that a permit once given should be *superior to the rights of a subsequent patentee of the land,*" but Congress said that it *"shall not be held to confer any right or easement or interest in, to or over any public land, reservation*

or park." What right had the Secretary to say this where Congress had said otherwise?

The language of the act is plain, simple and direct and is not open to construction and is repugnant to the intent attributed to it by the Secretary. The weakness of the position of the Secretary is well illustrated by the reach he has made for the Act of August 30, 1890.

In this act it is provided that in all patents for lands thereafter, taken under any of the laws of the United States, etc., it shall be expressed in the patent that there is reserved from the lands in said patent described a right of way therein for "ditches or canals constructed by the authority of the United States."

The Act of August 30, 1890, was passed to save the Government from having to acquire rights of way over lands thereafter patented in cases where the Reclamation Department desired to do reclamation work and construct ditches and canals, but has no application whatever to a permit right granted to some one else to construct canals.

The files of the Interior Department, in Nye *vs.* Washington Water Power Co., show that on June 3, 1910, and about one month after the opening of the Coeur d'Alene Indian Reservation the entryman wrote the Secretary of the Interior as follows:

> "In the recent opening of the Coeur d'Alene Reservation, Idaho, I filed on a piece of land along the St. Joe River, and was informed in the land office at Coeur d'Alene that it was subject to the rights of the Washington Water Power Company. I should like to get a statement from the Department as to what the rights of the Washington Water Power Company are

on the premises. I can not afford to leave my position here and move out there, only to find out that the land is not suitable for farming and impossible to obtain clear title to. It means a great deal to me to get the straight of this, and I hope you will deem it proper to furnish the statement. Yours truly, John A. Nye. My filing is on lots 17-13-11 and 9, township 46, 5.3, Sec. 3."

and that under date of July 28, 1910, the Acting Commissioner of the General Land Office replied as follows:

"I am in receipt of your letter of June 3, 1910, in which you state that you filed on a piece of land in the former Coeur d'Alene Indian Reservation, which, you state, is subject to the rights of the Washington Water Power Company, and ask to be informed as to the nature of the rights of the company over the land.

"The records of this office show that on July 27, 1902, the Washington Water Power Company was given permission to use a right of way 100 feet wide through the Coeur d'Alene Indian Reservation for the power transmission line, under the Act of February 15, 1901. Permission granted under the act is in the nature of a license, revocable at any time, no easement or fee being granted. Paragraph 43 of the regulations under which the permission was allowed, reads in part:

" 'The final disposal by the United States of any tract traversed by the permitted right of way is, of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract.'

"On the issuance of the patent to the land on which you have filed, the permit is revoked, *ipso facto*, as far as the same affects the land conveyed by the patent,

and a clear title to the entire tract will pass to the patentee.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner."

This regulation was at the time reported in the Land Decisions (31 L. D., 17), and the printed regulation was evidently on file in every Land Office.

The Constitution, Section 3, Article IV, provides that—

> "Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or the property belonging to the United States.
>
> "This is the supreme law of the land and embodies an express grant of power to the national government. * * * It has been construed to mean that title and rights in and to the public lands are created by the acts of Congress and must be governed by their provisions whether they be hard or lenient and that no rights whatever can be obtained in the lands of the United States except as Congress may consent."
>
> *Light vs. United* States, 220 U. S., 537; 55 L. Ed., 570; Rector *vs.* Ashley, 6 Wall., 142; 18 L. Ed., 733; Jordan *vs.* Barrett, 4 Haw, 184; 11 L. Ed., 924.

U. S. vs. Utah P. & L. Co. 209 Fed. 557

We believe the cases cited by counsel for appellee at pages 15 to 18, inclusive, of their brief will be found not to support their contentions in this case.

United States *v.* Moore, 95 U. S., 760, cited by appellee, was a case involving the status of an assistant surgeon in the Navy. There were two inharmonious statutes dealing with the qualifications and right of advancement for such offi-

cers. The court observed that the construction given to a statute by those charged with the duty of executing it is always entitled to a most respectful consideration, but the case was not determined upon that point. In concluding the opinion the court said:

> "In cases like this, the construction should be such that both provisions, if possible, may stand. The clause in question was obviously as much intended to have effect as the section with which it is in seeming conflict. It may well be held to be an exception, though not so expressed, to the universality of the language of the latter. This obviates the difficulty, harmonizes the provision, and gives effect to both."

In Heath *vs.* Wallace, 138 U. S. 573, cited by counsel, the question arose as to whether "Lands subject to periodic overflow" were "swamp lands" within the meaning of the Swamp Land Grant made to the State of California by Act of September 28, 1850. The Department caused an investigation to be made by the Surveyor General, and upon the facts held that *the land was not swamp land.* The court held that the findings by the Department were conclusive on such question, and cited with approval U. S. *vs.* Moore, *supra.* It will be observed that this line of authorities (and there are many cases to the same effect), simply holds that findings of fact on Departmental matters within the jurisdiction of such Department will not be disturbed by the courts, and that where a statute is ambiguous, indefinite, or easily capable of different constructions, the courts will not disturb a construction which has been adopted and acted upon by the Department.

Stoddard *vs.* Cahmbers simply holds that a patent issued

for lands *reserved from sale by law are not public* lands or subject to sale, and that such patent is simply void. Neither the facts nor the law discussed in that case have any bearing or throw any light upon the case at bar. Here the land patented to appellants was *public and subject to entry and sale.*

Jamestown & Northern R. R. Co., *vs.* Jones, 177 U. S., 125, cited by counsel, is dealing with the Act of 1875 granting a right of way through public lands to railroad companies, and holds that a definite location of the right of way of a railroad is sufficiently made by the actual construction of the road upon the ground although no profile map was ever filed. This case in no way affects the case at bar or throws any light on it.

The case of Smith *vs.* Townsend, 148 U. S., 490, is a case determining the right of one who was within the territorial limits of Oklahoma Territory at the hour of noon, April 22, 1889, to take a homestead under the act throwing that Territory open to homestead entry, and holds that such a person was disqualified to make an entry.

The Act of June 21, 1906 (34 Stat. at Large, 335), provided for the opening of the Cœur d'Alene Indian Reservation and allotment of lands to each man, woman and child belonging to the Indian tribes, and that the "residue or surplus lands should be opened to settlement and entry under the provisions of the homestead law," and that the money to be derived from the disposition of these lands should be turned into the fund and credited to "the Cœur d'Alene and Confederated Tribes of Indians." *Up to this time neither the Government nor the Indian tribes had received any compensation whatever from plaintiff for an easement or right of way through the Cœur d'Alene Indian Reservation for elec-*

trical power purposes. When the tracts were disposed of to defendants *they purchased and paid for the entire acreage, including the right of way now claimed by plaintiff.* If plaintiff is to continue to occupy and use this right of way *without paying* "just compensation" therefor under the laws of the State of Idaho providing for condemnation of easements, then, of course, *it will be getting its entire right of way through this land free,* and defendants, on the other hand, will have paid the Government, for the benefit of the Indian tribes, the full value thereof, and will still have to pay taxes thereon and permanently lose the use of this 100-foot strip through their farms. It will have acquired a right of way, it now values at $25,000.00 (Tr., 14), for nothing, whereas another light or power company going into the same Territory at any time since the opening of this reservation and patenting of lands to homesteaders would have to purchase or condemn a right of way for like purposes.

We respectfully submit that the judgment should be reversed.

JAMES F. AILSHIE,
Attorney and Solicitor for Appellants.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1923
No. 142

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB and ANTHONY KERR,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

BRIEF OF APPELLEE

JOHN P. GRAY,
FRANK T. POST,
Counsel for Appellees

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Appellee.

STATEMENT OF FACTS

The Washington Water Power Company is engaged in the generation and distribution of electricity in the States of Idaho and Washington.

Prior to the 7th of July, 1907, the power company filed an application with the Department of the Interior for a permit for a right of way across the Coeur d'Alene Indian Reservation in Idaho for the construction and maintenance of an electric power transmission line. The application was made under

the provisions of the Act of February 15, 1901 (31 Stats. at Large, 790) which act is as follows:

> "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber, or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest; Provided further, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of Title sixty-five of the Re-

> vised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: And provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

On July 7, 1902, the permit so applied for was granted by the Secretary of the Interior. At the time the permit was given, the lands over which the right of way was sought were a part of the Coeur d'Alene Indian reservation, unsurveyed and not open to settlement.

At about the same time the power company filed application with the Department of the Interior for authority to construct a telephone line over and across the Indian reservation under and pursuant to Section 3 of the Act of Congress approved March 3, 1901, entitled, "An act making appropriation for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes."

Under that application the Secretary of the Interior granted the appellee the right to survey, locate, and maintain the telephone line desired upon the payment of damages and compensation assessed under his direction, amounting to $224, which sum was paid by the

appellee into the office of the Commissioner of Indian Affairs.

Pursuant to the permit, the Washington Water Power constructed over and across the reservation and along the right of way designated, a high tension electric power transmission line extending from Spokane, Washington, to Burke, Idaho, in the Coeur d'Alene Mining District, which line has ever since August, 1903, been used for the purpose of supplying electric power and energy to that mining district.

The telephone line was constructed upon the same poles as the electric power transmission line, and is used in connection with and as incidental to the power transmission line.

For the purpose of constructing and maintaining the lines mentioned, a patrol road was built by the appellee during the years 1902 and 1903, along which the patrolmen of the water power company passed in patroling the line and keeping the same in repair and available for use.

Subsequently and in the year 1906, Congress passed an act making provision for the allotment of lands to the members of the Coeur d'Alene Tribe of Indians within the reservation and the subsequent opening of the reservation to settlement. (Act of June 21, 1906, 34 Stat. at Large, 335).

Later in the year 1910, the appellants made homestead filings on lands in the reservation over which the

power and transmission lines had been constructed, and subsequently made entry and received patents for said respective tracts of land.

Thereafter, the appellants denied any right on the part of the power company to operate or maintain either of said lines and interfered with the exercise of those claims of right. Four separate actions were brought by the appellee against the appellants seeking injunctions restraining them from interfering with the asserted rights of appellee and to establish by decree that the permit for the power line and the easement for the telephone line continued in full force and effect. At the trial, the four cases were consolidated and the issues practically reduced to one, which was and is whether the patents issued to the appellants revoked and cancelled the permit and easement theretofore granted by the Secretary of the Interior to the appellee.

The Circuit Court of Appeals in its opinion finds the facts as above stated. The opinion also refers to the fact that each of the appellants admitted that the water power company's plant had been constructed and was in use at the time when he first settled upon the land claimed by him. (Opinion Court of Appeals, Fols. 83 to 87).

In addition to the facts so expressly found, the following facts appeared without contradiction:

The official plats of the two townships (Pltfs' Exhibits 1 and 2) within which the lands of appellants lie, show that at the time of the survey the power line had been constructed across said townships. It was further proved that the power line was constructed along the right of way granted by the Secretary of the Interior and that the patrol road and power line are in the same place where they were built in the years 1902 and 1903. The testimony further showed the necessity for patrolling the line and the need of a patrol road along the same.

JURISDICTION

Jurisdiction was based upon the ground that the suits involved the construction and application of the acts heretofore referred to.

The jurisdictional value was alleged, shown and not controverted.

DECREE OF THE DISTRICT COURT

The District Court entered a decree sustaining the rights of the power company in substance as follows:

(1) That the permit granted by the Secretary of the Interior under the act of February 15, 1901, for the electric power transmission line is a valid and subsisting permit and in full force and effect and that the Washington Water Power Company is in possession of the right of way and of the power transmission line constructed over and across the same;

(2) That the Washington Water Power Company is the owner of a right of way easement for a telephone line over the identical right of way for the electric power transmission line and that the telephone line as now constructed is incidental to the use of the power transmission line and said right of way easement is now in full force and effect;

(3) That the plaintiff is entitled to maintain along the transmission line and telephone line a roadway which must be within 50 feet of the center of said line as now constructed and the agents, servants and employes of the Water Power Company are entitled to go along the same at all times and keep and maintain the roadway for such purpose;

(4) That the plaintiff is further entitled in making repairs or renewals to the use of such land within 50 feet of the center of said line as may be necessary therefor;

(5) That the title of the defendants is subject to the foregoing rights of the Water Power Company.

It was further decreed that if any of the defendants (appellants) maintains any fence or fences on, around or across the lands he must provide gates therein for the plaintiff's use of sufficient width for the passage of ordinary vehicles at the places where the roadway passed through such fences, and the

Water Power Company should furnish locks and keep the gates locked.

The court further enjoined the defendants (appellants) from interfering with the plaintiff in the maintenance and operation of said power line, telephone line and patrol road, or in making repairs or renewals.

It was decreed that the rights of the plaintiff (appellee) should be limited to the strip of land 50 feet on each side of the electric power transmission line and that subject to the plaintiff's (appellee's) reasonable needs, the defendants (appellants) should have the right to occupy and use the strip of land and the Water Power Company and its employes, in going along said road, should use reasonable care to do no more injury to the defendants' growing crops than may be reasonably necessary, and must keep within 50 feet of the center line and in a roadway on one side or the other thereof, except as may be necessary in passing from the road to the poles or line, and that in making repairs or renewals reasonable care should be exercised not to do unnecessary damage to crops growing along the line. (R. pp. 34-37).

From that decree an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit which affirmed the District Court, and from the decree of the Circuit Court of Appeals, this appeal has been prosecuted.

ARGUMENT.

In compliance with the acts above mentioned, appellee received a permit to construct a power line and an easement along the same right of way to construct a telephone line. At the time these rights were granted, the lands were unsurveyed lands within an Indian reservation.

After receiving the permit, the appellee expended a large sum of money in the construction of its power line from Spokane, Washington, to the Coeur d'Alene Mining District, a total distance of over 100 miles, the section of the line across the Indian reservation being only a part of the entire transmission line, but, of course, its existence is essential to the maintenance of service upon the entire line.

Notwithstanding the large investment in the construction of this line; that it served an important public use and was intended to serve such public use when the permit was granted and the line constructed, it is the contention of appellants that the subsequent survey of the land and the issuance of patent therefor by the United States in itself revoked the permit to construct and maintain the electric power transmission line.

Appellants urge that the grant of a right of way for the transmission line to the appellee was a mere license; that the permit was a mere permissive, temporary occupation of the land and that the issuance of the patent to the legal subdivisions across which it was construct-

ed instantly worked its revocation. In other words, that the principle of private property law which applies to the granting of a personal license should be applied in construing the rights acquired under the statutes in question.

CONSTRUCTION OF ACT BY COURTS.

The Circuit Court of Appeals in its opinion clearly distinguished between such a mere personal license and the rights conferred upon appellee by the United States in pursuance of the statutes here involved. That court calls attention to the fact that if the grants were mere licenses, then the rights acquired could not be transferred or alienated by the power company. The court said:

> "It would hardly be contended that the appellee could not have at any time transferred or conveyed its power and telephone lines, with all incidental rights pertaining thereto, to some other company or person, or that its rights in the premises would not have passed to its creditors in the event it had been unsuccessful in its business." (R. p. 42).

The precise question presented in this case was once before decided by the District Court of the District of Idaho in a case which involved the same power and transmission lines over another tract of land.

> *Washington Water Power Co. v. Harbaugh,* 253 *Fed.* 681.

Judge Deitrich in the opinion in that case fully discussed the law and the decisions of the Interior Department construing it, and adopted the view that the issuance of a patent to the subdivisions across which the

power line had been constructed did not revoke the appellee's permit for a right of way. The views which he expressed in that opinion were followed in the present case. In his opinion in the Harbaugh case, Judge Dietrich referred to and approved the construction of the statute by the Secretary of the Interior, to which we now refer.

CONSTRUCTION OF THE ACT BY THE INTERIOR DEPARTMENT.

The decisions of the courts below in this case are in harmony with the construction which has been given to the Act of February 15, 1901, by the Secretary of the Interior. Under date of August 23, 1912, the Secretary of the Interior in a communication addressed to the Commissioner of the General Land Office, carefully considered and construed the statute involved in so far as it applies to questions such as are presented in this case. In the course of that opinion, the Secretary said:

> "In view of the permanent character of the works authorized to be constructed under the act of February 15, 1901, and the large investment necessary to such construction the statute ought not to be interpreted as giving a precarious tenure except in so far as clearly appears from the words used by Congress. After careful consideration of the matter I am of the opinion that the intent of Congress was to protect the public by retaining in the hands of the Secretary of the Interior full control over water-power development through the device of making permits revocable in his discretion. The statute authorized, in more generous and comprehensive terms than had been used in

any preceding statute, the development of water for domestic and public supply, irrigation, mining, and power, and also the development and transmission of electricity. Its primary purpose was to encourage development under unquestioned public control. The former regulation, which provided that—

> the final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract—

was directly contrary to the purpose of the statute as above interpreted. It discouraged development by making the title of the permittee subject, to that of the final patentee of the land occupied under the permit, and it abandoned all attempt at public control as soon as the land was finally disposed of.

To effectuate the purpose of the statute it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute.

The contrary view, which was expressed in the provision of paragraph 43, above quoted, rests on a misleading analogy between these statutory permits and a license not coupled with an interest given by a private landowner to a stranger. But the rule of private real property law under which such a license is revoked by the transfer of the fee simple title has no application to either the legal or the economic data with which Congress was dealing in this legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of such intent. It is, of course, unquestionable that it was entirely within the power of Congress to

provide a different rule if in its judgment under the circumstances the public welfare required it."

The communication and opinion of the Secretary above referred to is for convenience incorporated in this brief as Appendix I.

The administration of the Act of February 15, 1901, in so far as it affects permits granted within forest reserves is under the supervision of the Department of Agriculture. As Secretary Fisher points out in his letter of August 23, 1912, the Department of Agriculture had never taken the view that the disposal by the United States of any tract traversed by a right of way under the act revoked the permit.

The construction given by Secretary Fisher in 1912, is the settled construction of the statute by the Department of the Interior. That view has never been changed.

It is maintained by counsel for appellant that a decision of the Secretary of the Interior in the case of

Nye v. Washington Water Power Co.,

dated April 28, 1921, overruled the previous construction of the Act of February 15, 1901, by the department.

Involved in the Nye case was a permit to overflow certain lands within the Coeur d'Alene Indian reservation for reservoir purposes. The Secretary of the Interior, for reasons which he considered equitable and there set out, revoked that permit in so far as Nye

and certain other entrymen were concerned, leaving it in force as to other entrymen.

It is urged here and was urged upon the courts below that because of that decision that where patents issued upon homestead filings made prior to August 23, 1912, such patent revoked the permit.

It is clear that the opinion in the Nye case does not so hold and does not modify the conclusions of the department as set forth by Secretary Fisher. If such a view was taken, the decision in the Nye case would be inconsistent in itself. It would indicate a discrimination between two classes of settlers. By that decision, the Secretary of the Interior revoked the permit as to certain entries which were made prior to August 3, 1912, and declined to revoke it as to other entries made prior thereto. In reading the decision, it will be clear that the Secretary was exercising a discretion in favor of certain settlers who made an equitable appeal to him and against others.

Either the permit is valid as a matter of law and subsisting or it was terminated by the issuance of the patent. Both the courts below have held that it is valid and subsisting.

The construction of statutes by executive departments charged with the duty of administering them should not be overruled without cogent reasons and the settled construction of such statutes by the officers of one of the great executive departments of the govern-

ment should not be overruled unless it is clearly erroneous.

United States v. Moore, 95 U. S. 760
Heath v. Wallace, 138 U. S. 573.

With reference to the revocation of a permit under the statute, the Circuit Court of Appeals in this case reached the same conclusion as Secretary Fisher in his construction of the statute. In the course of its opinion, the Court of Appeals says:

> "The permission granted to the appellee was subject to revocation at any time by the then Secretary of the Interior or his successor; but that was the sole condition to the continuous existence of the rights of way granted, and that reserved power on the part of the grantor was never exercised prior to the issuance of the patents to the appellants, nor since, so far as appears. Whether the rights of way could be revoked by the present or any other successor of the then Secretary is not for consideration in the present case." (Trans. Fol. 87).

OBJECT OF ACT OF FEBRUARY 15, 1901.

The object of the Act of February 15, 1901, was to foster the development of the resources of the country by the generation and distribution of electric power and the promotion of irrigation, mining, manufacturing and other beneficial and legitimate commercial enterprises. Manifestly, it was not intended by Congress that when a permit had been granted by the Secretary of the Interior under the act such permit should be revoked except when there was a just and substantial

reason for such action. The act contemplates the construction of permanent works and plants. Congress was aware of the fact that such works and plants could not be constructed without the investment of very large sums of money. Clearly, it must have been the intent of Congress to give a tenure and right which would tend to effectuate the purposes of the act.

It is reasonable to believe it was the intention of Congress that when a permit was issued for such a right of way and a large investment made that the subsequent patenting of the legal subdivisions over which such a right of way extended did not result in a revocation of the permit. Had any such intention been expressed in the act it is evident that no such large investments would ever have been made. The act was intended to encourage development and not make it hazardous.

There is nothing in the statute which indicates an intention that the permit should be revoked by the subsequent patenting of the lands to a settler, and such a construction would tend not to effectuate the purpose of Congress in enacting the statute, but would tend to retard and prevent the very development which Congress sought to encourage. It is much more reasonable to believe that the power of revocation was retained in the Department in order that certain governmental control might be exercised for the public good in harmony with the growing sentiment that some such

control should be retained in the hands of the United States.

There is nothing at all to indicate that the Secretary of the Interior has ever in the exercise of his discretion or at all revoked or intended to revoke the permit of the appellee. The Court of Appeals so holds. Until the permit is revoked in the manner provided in the statute, the appellee has the right to maintain and operate its power line.

THE FORM OF PATENT.

The patents of appellants were issued subsequent to the decision of the Secretary of the Interior of August 23, 1912 and the regulations promulgated thereunder, but their patents did not expressly except the right of way for the power transmission line and the telephone line. In its opinion, the Circuit Court of Appeals refers to this and says:

> "It is conceded—or seems to be conceded, by counsel for the appellants, that had the patents in terms excepted the permits that had been theretofore granted by the Secretary of the Interior in pursuance of the act of Congress that has been referred to, the previously existing rights of the appellee would not have been affected." (Trans. Fol. 87).

Judge Dietrich in the Harbaugh case, supra, referring to the same fact, said:

> "The record does not purport to furnish any explanation for this omission, but in view of the other express provisions of the regulations, it

> cannot be held that the silence of the patent in this respect imports an intent on the part of the Secretary of the Interior to revoke the license. It is much more reasonable to assume that the absence of the notation is the result of inadvertence or carelessness on the part of some subordinate officer or employe, and neither the right of the plaintiff to use such right of way nor of the Government to control it could be divested by a mere clerical omission."

The issuance of a patent is a mere ministerial act, and if it be issued for lands reserved from sale by law it is void.

Stoddard v. Chambers, 2 Howard, 284.

That the patent contains no express reservation of a right of way is of no consequence.

Jamestown & Northern R. Co. v. Jones,
177 U. S. 125.
Smith v. Townsend, 148 U. S. 490.

THE ACT OPENING THE COEUR D'ALENE INDIAN RESERVATION IS NOT INCONSISTENT WITH OR REPUGNANT TO THE ACT UNDER WHICH APPELLEE'S RIGHT OF WAY WAS SECURED.

The Act of June 21, 1906, opening the Coeur d'Alene Indian reservation is not inconsistent with or repugnant to the Act of February 15, 1901. In

State v. Stoll, 17 Wallace, 425-431.

this principle is laid down:

> "It must appear that the later provision is certainly and clearly in hostility to the former.

> If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part or wholly, as the case may be."

And such also has been the view adopted in the construction of other statutes by the Land Department. The doctrine of the department is well stated by Secretary Noble in

In re Annie Knaggs, 9 L. D. 49

as follows:

> "Statutes are repealed by express provisions of a subsequent law, or by necessary implication, and in the latter case there must be such a positive repugnancy between the provisions of the old and new law that they cannot stand together, or be consistently reconciled. Repeals by implication are not favored in law, and are never allowed but in cases where inconsistency and repugnancy are plain and unaviodable, and it is a question of construction whether or not an act professing to repeal or interfere with the provisions of a former law operates as a total, or partial, or temporary repeal; and if there are two acts seemingly repugnant, if there is no clause of repeal in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication."

REPLY TO CERTAIN ARGUMENTS IN APPELLANTS' BRIEF.

In appellants' brief at pages 36 to 38, it is argued that the appellee should be required to condemn the right of way for this existing line which was construct-

ed with the permission of the then owner of the land. It is argued that the appellee is a public service corporation and therefore has the power in Idaho to condemn lands necessary for its purposes.

On page 38, it is said that all the states in which permits for power transmission lines have been granted under the Act of February 15, 1901, confer upon such corporations the power to condemn lands necessary for their uses.

This would seem to be an argument of no importance in undertaking to interpret the intent of Congress in enacting the statute under consideration. A casual consideration convinces that the argument of appellants is without weight.

By the act under consideration, authority is given to the Secretary of the Interior to permit the use of rights of way, not only for such public uses as a power transmission line to be constructed by a public utility, but for private mining, timber or lumber uses. Many of the purposes for which rights of way may be granted under the act are private uses in at least some of the public land states, and uses for which lands cannot be condemned. In California, for instance, the owner of a gold mine sought to condemn a right of way for the purpose of constructing a ditch and flume to carry off the tailings from the mine. It was held not to be a public use.

Consolidated Channel Co. v. Central Pacific R. R. Co., 51 Cal. 269.

In

Amador Queen G. M. Co. v. De Witt, 73 Cal. 73 Cal. 482.

the plaintiff undertook to condemn a right of way through defendant's land for a mining tunnel. It was held to be not a public use.

In Idaho a different view is taken and the necessary use of lands for mining purposes may be acquired by condemnation. The act of congress, however, under consideration applies to all the public land states. It, of course, will receive a uniform construction, and it would seem that the question of whether or not the land might be condemned under state constitutions or laws should have nothing to do with the interpretation of the act. If, however, such consideration be of any importance, then the law is against appellants upon that question, for then appellants would take the land subject to the rights of way for public purposes then existing across it.

Roberts v. Northern Pacific R. Co., 158 U. S. 1.
Maffit v. Quine, 93 Fed. 347, 349.

In the *Roberts* case, this court held:

> "Damages to land by the construction of a railroad do not pass to a grantee of the land under a deed made subsequent to that time, unless expressly conveyed therein."

In *Maffit v. Quine,* a flume had been constructed upon land which at the date of its construction either was public land of the United States or belonged to the Northern Pacific Railway, under its grant. If it be-

longed to the railroad, it subsequently became public land.

After the construction of the flume, a homesteader settled upon the land and at a later date broke down and destroyed a portion of the flume where it passed across his land and prevented its use in the transportation of lumber from the plaintiff's mill to the point of shipping. The suit was brought by the owner of the flume to restrain the defendant in the commission of the acts complained of. In the course of the opinion, the court said:

> "Moreover, it is settled that where a company having the power of eminent domain has entered into possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such land, a subsequent vendee of the latter takes the land subject to the burden thus placed upon it; and the right to payment from the company, if it entered by virtue of an agreement to pay, or to damages if the entry was unauthorized, belongs to the owner at the time the company took possession. Roberts v. Railroad Co., 158 U. S. 1, 15 Sup. Ct. 756; Railroad Co. v. Murray, 31 C. C. A. 183, 87 Fed. 648. This doctrine applies in a case of this character. It may be questioned whether the company taking the right of way must have the power of condemnation; but, where such power exists, the established rule is that the owner at the time the possession was taken is entitled to the resulting damages where the entry was unauthorized, and that such damages cannot be recovered by the subsequent grantee of the premises. That a company like this has the right of condemnation is held in the case of Lumbering Co. v. Urquhart, 16 Or. 67, 19 Pac. 78."

The court also commented upon the fact that the defendant settled upon the land several years after the flume was constructed and in operation and had continued to reside there without making objection to it or complaint concerning it; that the damages suffered by him appeared to be merely nominal and his acts vexatious.

We respectfully submit that the decision appealed from should be affirmed.

Respectfully Submitted,

JOHN P. GRAY,

FRANK T. POST,

Counsel for Appellee.

APPENDIX I.

Department of the Interior,
Washington, August 23, 1912.

The Commissioner of the General Land Office.

Sir: Regulation concerning right of way over public lands and reservations for canals, ditches, and reservoirs, and use of right of way for various purposes approved June 6, 1908, embraced (pars. 37 to 45, inclusive) regulations under the act of February 15, 1901 (31 Stat., 790), entitled "An act relating to rights of way through certain parks, reservations, and other public lands."

This statute authorizes and empowers the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forests, and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National Parks, Cal.—

> for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed 50

feet on each side of the marginal limits thereof, or not to exceed 50 feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named.

The statute expressly provides—

> That any permission given by the Secretary of the Interior under the provisions of this act may be revoked by him or his successor, in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

Paragraph 43 of the regulations above referred to contained the following provision:

> The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the department, a revocation of the permission so far as it affects that tract.

By letter of May 7 to you, amending said paragraph 43, the provision last above quoted was omitted. Upon further consideration it is deemed advisable to further amend the regulations in this particular.

By the forest transfer act of February 1, 1905, section 1 (33 Stat., 628), the administration of the act of February 15, 1901, so far as it affects forest reservations was transferred to the Department of Agriculture. That department has never adopted that provision of the former regulations of this department last above quoted.

In view of the permanent character of the works authorized to be constructed under the act of February 15, 1901, and the large investment necessary to such construction the statute ought not to be interpreted as giving a precarious tenure except in so far as clearly appears from the words used by Congress. After careful consideration of the matter I am of the opinion that the intent of Congress was to protect the public by retaining in the hands of the Secretary of the Interior full control over water-power development through the device of making permits revocable in his discretion. The statute authorized, in more generous and comprehensive terms than had been used in any preceding statute, the development of water for domestic and public supply, irrigation, mining, and power, and also the development and transmission of electricity. Its primary purpose was to encourage development under unquestioned public control. The former regulation, which provided that—

> the final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission, so far as it affects that tract—

was directly contrary to the purpose of the statute as above interpreted. It discouraged development by making the title of the permittee subject, to that of the final patentee of the land occupied under the permit, and it abandoned all attempt at public control as soon as the land was finally disposed of.

To effectuate the purpose of the statute it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute.

The contrary view, which was expressed in the provision of paragraph 43, above quoted, rests on a misleading analogy between these statutory permits and a license not coupled with an interest given by a private landowner to a stranger. But the rule of private real property law under which such a license is revoked by the transfer of the fee simple title has no application to either the legal or the economic data with which Congress was dealing in this legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of such intent. It is, of course, unquestionable that it was entirely within the power of Congress to provide a different rule if in its judgment under the circumstances the public welfare required it.

In this connection, attention is called to the provision of the act of August 30, 1890 (26 Stat., 391), which reads as follows:

> In all patents for lands hereafter taken up under any of the land laws of the United States * * * * west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way therein for

ditches or canals constructed by the authority of the United States.

It is to be noted that this reservation was required by a statute passed more than 11 years before the statute under which these permits are issued, and that the words of the reservation are not limited to ditches and canals constructed by the United States, but are expressly extended to those constructed by "the authority" of the United States. This statute clearly shows that Congress, at a comparatively early date, realized the necessity of providing permanent reservations for ditches and canals. Doubtless the primary purpose in view was to safeguard the future construction of ditches and canals upon lands taken up before the construction should be authorized, by making all public lands thereafter taken up in the arid region subject to a public easement for that purpose whenever the Government should deem it wise to authorize such construction, as has since been done by the reclamation act of 1902; but it is clear that Congress realized and meant to provide against acquisition of adverse rights after construction which, though later in time, might otherwise be claimed to be prior in law to the ditch right. I am of the opinion that a ditch or canal constructed under permit issued under the act of February 15, 1901, is protected by the act of August 30, 1890, against any adverse claim set up by a subsequent patentee of the land traversed by the canal or ditch, and that this protection will continue at least until the Secretary

of the Interior shall revoke the permit which authorized the construction of the canal or ditch. Even after such revocation it is probable that the public right to issue another permit continues and is superior to the rights of the patentee.

As to the numerous other works for which right of way may be permitted under the broad and inclusive terms of the act of February 15, 1901, I am of the opinion that, in the absence of a regulation to the contrary issued under the broad authority given by the statute, the rights of the permittee continue after the issuance of patents to the lands affected and are superior to the rights of the patentees until such time as the Secretary shall exercise his discretionary power to revoke. It is, however, desirable that this construction of the statute shall be embodied in a regulation which can not be misunderstood. The regulations are therefore amended as follows:

At the end of paragraph 38 add the following words:

> The final disposal by the United States of any tract traversed by a right of way permitted under the said act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act.

It is also desirable that such patents should contain on their faces a notation of the prior permits and of all easements to which the lands are servient when the

patent issues. You will therefore be guided by the following regulation in the issuance of all patents:

> In every patent hereafter issued for a tract of land traversed by a right of way approved or permitted (including revocable permits) under any of the right of way laws and not forfeited or revoked before such issuance, such right of way or permit shall be expressly noted on the face of the patent by specific reference to the date when the statute under which the approval was made or permit issued. Such notation shall be in substantially the following form:
>
> Sec.———, T.——, R.——, is subject to all rights under an application by——, numbered——, and approved——, 19—, under the act of——, being an application for——.

It may be noted that the subject matter of the foregoing amendment is touched upon by two pending bills (S. 6440 and H. R. 19858). The department has expressed its views (by letter of May 2, 1912, to the chairman of the Senate Committee on Public Lands) on the Senate bill. The regulations hereinbefore made will protect permittees from any demands that might otherwise be made upon them by subsequent claimants of the lands over which the permits give a right of way. The rights of the public, however, are not fully protected, because private arrangements between such claimants, after they have obtained patent, and the permittees might give the permittees a perpetual right of way for any of the enumerated works (except a canal or ditch) free of the regulative power intended to be reserved to the Secretary of the Interior by said statute.

The public can be safe-guarded against this danger by withdrawal under the act of 1910 (36 Stat., 847) of all lands outside of national forests over which rights of way have hitherto or shall hereafter be permitted under the said statute by permits which remain unrevoked. The statutes relating to national forests reserve them from appropriation at the will of individuals, except under the mineral laws and certain of the right of way laws. The general withdrawal act of 1910 also subjects the withdrawn land to private appropriation under the mining laws, except as to coal, oil, gas, and phosphate. Lands within national forests servient to existing permits under the act of 1901 are therefore already protected from private appropriation in like manner, though not to like extent, as are those withdrawn under the act of 1910.

The withdrawals hereby ordered should be limited to the extent necessary to protect the works. In fixing this limit the department is not restricted to the designation of legal subdivisions or aliquot parts thereof. For example, withdrawal for a transmission line should include only a 100-foot strip.

You are hereby instructed to take up this matter with the Director of the Geological Survey with a view to your recommending jointly with him such withdrawals as are required by this letter.

Very respectfully,

WALTER L. FISHER, *Secretary.*

SWENDIG ET AL. *v.* WASHINGTON WATER POWER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 142. Argued February 21, 1924.—Decided May 26, 1924.

1. The Act of March 3, 1901, providing for granting rights of way for telephone lines, does not apply to wires strung on the poles of an electric power line and used only in connection with its operation and maintenance. P. 327.
2. The Act of February 15, 1901, authorizes the Secretary of the Interior, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, reservations and certain parks, for electric power lines, etc., and declares that such

permission may be revoked by the Secretary who gave it or his successor, in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park. *Held:*

(a) The right of use continues until the permit has been revoked by the Secretary. P. 329.

(b) The Secretary has power to adopt a regulation that final disposition by the United States of any tract traversed by a permitted "right of way" shall revoke the permission *quoad* that tract; and to change the regulation by providing that tracts when so disposed of shall remain subject to a right of use previously permitted until the permission has been specifically revoked under the act. *Id.*

(c) Where lands of an Indian reservation on which an electric transmission line was constructed and in operation under such a permit, were thrown open and entered under the homestead law, at a time when a regulation provided that final disposition of the tracts should revoke the permit *pro tanto*, and were afterwards conveyed to the entrymen by patents making no reservation of the permit, but not until after the regulations had been amended to continue the permission in such cases until specifically revoked,—the patentees took subject to the permit. P. 330.

281 Fed. 900, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court enjoining the appellants from interfering with the operation and use of the appellee's (plaintiff's) electric power line, and quieting the appellee's right to use the land traversed by it, under permits from the Secretary of the Interior.

Mr. James F. Ailshie for appellants.

Under the act of Congress, appellee acquired no easement, interest or title, but only a license.

Its present rights must be construed as the rights of any other individual operating under a revocable license, and its rights may be extinguished in the same manner and under the same condition as those of a licensee under a private individual.

If the United States could revoke this permit or license at its option, clearly it is revoked by any act on the part

of the United States which shows an intent to revoke, or which is inconsistent with the continued existence of the license.

Any act of the Government which withdraws the lands from the category of "public land, reservation, or park" terminates the permit, since such a permit can only be granted over such lands.

It is an elementary principle of law that for a license to exist the licensor must have some right to or interest in the thing upon which the license is to operate, and that when such right or interest of the licensor is extinguished, so also is the license extinguished. It appears to have been uniformly held that an absolute conveyance of land revokes any license to the use thereof. *De Haro* v. *United States*, 5 Wall. 599; 18 Am. & Eng. Encyc. of Law, p. 1141.

When a patent, absolute upon its face, has been issued by the Land Department and delivered and accepted by the patentee, the title of the United States goes with it and all right to control the title or land, or to decide on the right to the title, has passed from the Executive Department of the Government. *United States* v. *Schurz*, 102 U. S. 378; *Moore* v. *Robbins*, 96 U. S. 530; *Iron Silver Min. Co.* v. *Campbell*, 135 U. S. 286; *United States* v. *Stone*, 2 Wall. 525.

At the time when the Indian Reservation was thrown open to settlement, the regulations of the Land Department provided that a patent issued to a settler would revoke any permit outstanding on the land under this statute. This regulation was in effect when these appellants made their homestead entries, and when one of them made final proof.

The Land Department changed the regulations (41 L. D. 152) later; but if it be granted that it could change the construction of the statute, it could not thereby affect the rights of these appellants.

Entry by a settler upon public land, and the receipt of a certificate of entry from the Land Department, instantly

segregates the land from the public domain; and a patent subsequently issued takes effect as of the date of the entry. *Witherspoon* v. *Duncan,* 4 Wall. 210; *Wirth* v. *Branson,* 98 U. S. 118; *Cornelius* v. *Kessel,* 128 U. S. 456.

This identical question came up before the Land Department in a case wherein appellee was also a party. *Nye* v. *Washington Water Power Co.* (April 23, 1921).

Mere occupation and improvement of public land does not confer a vested right in the land so occupied, so that the occupant can maintain a right of possession against the United States or the grantee of the United States. *Northern Pac. R. R. Co.* v. *Smith,* 171 U. S. 260; *Johnson* v. *Drew,* 171 U. S. 93.

The principle that one should be estopped from asserting a right to property about which he has, by his conduct, misled another, cannot be invoked against the United States, or by one who, at the time the improvements were made, was acquainted with the true character of his title or with the fact that he had none. *Steel* v. *Smelting Co.,* 106 U. S. 447.

The Act of March 3, 1901, 31 Stat. 1083, applies only to telephone lines operated for the use and benefit of the public at large, where the company operates them as a business and charges tolls, and not for its own private use as an accessory to some other business.

Appellee should pay just compensation for an easement.

Mr. Frank T. Post, with whom *Mr. John P. Gray* was on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

Appellee is a corporation engaged in the generation and distribution of electrical energy in Washington and Idaho. It has a high tension power transmission line extending from Spokane, Washington, to Burke, Idaho, in the Cœur d'Alene Mining District. The line was constructed in 1902 and 1903. A portion of it was located across certain

lands then unsurveyed and constituting a part of the Cœur d'Alene Indian Reservation. Telephone wires were strung on the poles carrying the power line for use in connection with the operation and maintenance of that line. And there was constructed a patrol road necessary for the maintenance of the power line. Ever since its construction, the power line has been used to furnish electrical energy in that district.

July 7, 1902, the Secretary of the Interior under authority of the Act of February 15, 1901, c. 372, 31 Stat. 790, granted appellee a permit for the use of a right of way upon which to construct and maintain the power line through the reservation; and about the same time, he granted appellee a right of way for the construction and operation of a telephone line through the reservation, under authority of the Act of March 3, 1901, c. 832, 31 Stat. 1083.

An Act of Congress of June 21, 1906, c. 3504, 34 Stat. 335, provided for the allotment of lands within the reservation to members of the Cœur d'Alene Tribe, and authorized the opening to settlement and entry of the lands remaining undisposed of. Pursuant to the President's proclamation, this was done in May, 1910. Appellants respectively made homestead entries of certain of those lands across which the power line had been constructed, and later received patents therefor.[1] The patents are absolute in form and contain no exception or reservation in respect of the power line or privileges granted appellee. The appellants, denying the right of appellee after patents to operate and maintain the power line across the lands described in their patents, interfered with and threatened to prevent its use. Appellee brought a suit in the United

[1] Dates of filings and patents are as follows: Swendig filed May 2, 1910; patent issued October 30, 1913. Miller filed May 4, 1910; patent issued January 23, 1913 [1914]. Grab filed May 7, 1910; patent issued September 24, 1912. Kerr filed December 22, 1910; patent issued October 15, 1918.

States District Court for Idaho against each of the appellants to enjoin such interference, and to have it decreed that the patents did not revoke or affect the permits, and that they are in full force and effect. Jurisdiction was invoked on the ground that the suits arose under the laws of the United States above referred to. The four cases were tried together. The District Court granted appellee the relief prayed. Its decree was affirmed by the Circuit Court of Appeals. 281 Fed. 900. The case is here on appeal under § 241 of the Judicial Code.

The question to be decided is whether, as to the lands described therein, the patents issued to appellants revoked or canceled the permits theretofore granted to appellee by the Secretary.

The Act of March 3, 1901, 31 Stat. 1083, relating to rights of way for the construction of telephone lines does not apply. The telephone wires are used only in connection with the operation and maintenance of the power line. Appellee's rights are to be determined under the Act of February 15, 1901. Its material provisions are:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant National parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes, and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical

or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or [for] any one or more of the purposes herein named: . . . *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

When the homestead entries were made by appellants, the regulation of July 8, 1901, was in force. Paragraph 11 (31 L. D. 17) contains the following: "The final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract, and any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department." August 24, 1912, before the patents were issued, this provision was superseded by the following regulation (41 L. D. 152, par. 9): "The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act." At the same time, the Secretary by regulation required that all patents issued have on their face a notation of prior permits.[2]

[2] The order with respect to notations was recalled and vacated by the regulations approved April 14, 1915 (44 L. D. 6). See also 45 L. D. 477.

It was competent for Congress to make subsequent homestead entries subject to the Act of February 15, 1901, and to the regulations fixed by the Secretary. And undoubtedly the power and authority of the Secretary under the act may be so exercised as to affect the rights and limit the title of subsequent homestead entrymen. Within the scope of the authorization, he may make, and from time to time change, regulations for the administration of the act. The rights of appellants as entrymen were subject to the proper exercise of that power. The regulation in effect when appellants settled on the land expressly provided that permissions granted were subject to further and future regulation. At that time, the right of way was occupied and used for the operation of the power line. When the patents issued, that regulation had been superseded by the one of August 24, 1912.

Appellants contend that appellee acquired a mere license temporarily to use the right of way through the lands in question, and that the patents without more revoked the license and deprived appellee of its right of way over the lands therein described. In support of this contention, they stress the concluding clause of the act, stating that the permission given "shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." The purpose of the act is to grant to the Secretary power "to permit the use of rights of way" through the lands referred to. And, in order that control over them may be retained, it is provided that the Secretary in his discretion may revoke such permits. The enterprises mentioned in the act involve expensive and permanent construction. The use of land necessary for the undertakings specified is to be distinguished from mere licenses to travel over, graze cattle on, or otherwise use or occupy land without investment for construction or improvements. Plainly, the piecemeal revocation of the right of way, whenever a patent is

issued to a settler along the line, would increase the financial burden and add elements of risk to the investments, and so be inconsistent with the purpose of the act. The clause above quoted should be read to promote and advance, not to defeat, the legislative purpose to permit the use of rights of way through public lands for the industries and utilities mentioned. It is included from an abundance of caution to support and safeguard the Secretary's power of revocation. It means that the permissions given shall not be deemed to confer any right that may not be revoked by him in the exercise of his discretion. There is no other enactment providing for the termination of the use of the rights of way. The right to use continues until the permission given by the Secretary is revoked by him.

As the sole power of revocation was committed to his discretion, it was within the power of the Secretary to determine that final disposal of the lands would operate to revoke the permission; and it was also within his power, by the regulation of August 24, 1912, to declare that final disposal shall not be deemed to be a revocation, but shall be subject to the right of way until such permission shall have been specifically revoked. Upon elaborate consideration, in 1912, the Secretary held that the provision of the regulation first above quoted was directly contrary to the purpose of the statute. He said, "It discouraged development by making the title of the permittee subject to that of the final patentee of the land occupied under the permit, . . . To effectuate the purpose of the statute it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute. . . . The regulations hereinbefore made [41 L. D., *supra*] will protect permittees from any demands that might

otherwise be made upon them by subsequent claimants of the lands over which the permits give a right of way." (Letter of August 23, 1912, from the Secretary of the Interior to the Commissioner of the General Land Office.)

The regulation is still in effect. The construction and application of the act so made and provided for have been followed since that time. If the meaning of the act were not otherwise plain, this interpretation would be a useful guide to the ascertainment of the legislative intention. It is a "settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons." *Logan* v. *Davis,* 233 U. S. 613, 627.

Appellants contend, and it is true as a general rule, that when, conformably to the laws, entry is made and certificate given, the land covered ceases to be a part of the public lands (*Witherspoon* v. *Duncan,* 4 Wall. 210, 219), and that, when a patent issues in accordance with governing statutes, all title and control of the land passes from the United States. *United States* v. *Schurz,* 102 U. S. 378, 396. But we hold that, under the act and the regulation made pursuant to it and in force when the patents issued, these rules do not operate to strike down rights, subject to which, under the law, the lands are patented. Under the permission of the Secretary, the power line had been constructed and was maintained on the right of way over the lands in question for a long time before the reservation was opened for settlement. The entries were made subject to the regulations then in force, and were affected by the provision that "any permission granted hereunder is also subject to such further and future regulations as may be adopted by the Department." The fact that the patents did not have thereon a notation of the prior per-

mit is not controlling. Under the regulation then in force, final disposal did not revoke the permit, but was made subject to the use of the right of way for the power line. It was intended that the patent should not extinguish the earlier permission given by the Secretary. The issuing of the patents without a reservation did not convey what the law reserved. They are to be given effect according to the laws and regulations under which they were issued. See *Stoddard* v. *Chambers*, 2 How. 284, 318; *Jamestown & Northern R. R. Co.* v. *Jones*, 177 U. S. 125; *Smith* v. *Townsend*, 148 U. S. 490.

Decree affirmed.
